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# EDITOR'S NOTE

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No. 86-890-CFX  
Status: GRANTED

Title: Dean Deakins, et al., Petitioners  
v.  
William Monaghan, et al.

Docketed:  
November 26, 1986

Court: United States Court of Appeals  
for the Third Circuit

Counsel for petitioner: Nodes, Allan J.

Counsel for respondent: Fitzpatrick, Edward N., McGahn  
Jr., Patrick T.,

Entry	Date	Note	Proceedings and Orders
1	Nov 26 1986	G	Petition for writ of certiorari filed.
2	Dec 24 1986		Brief amicus curiae of Commonwealth of Pennsylvania, et al. filed.
3	Jan 2 1987		Brief of respondents in opposition filed.
4	Jan 5 1987		Lodging received. (9 copies).
5	Jan 7 1987		DISTRIBUTED. January 23, 1987
6	Jan 21 1987	X	Reply brief of petitioners Dean Deakins, et al. filed.
7	Jan 27 1987		Petition GRANTED. *****
8	Mar 13 1987		Joint appendix filed.
9	Mar 13 1987		Brief of petitioners Dean Deakins, et al. filed.
11	Mar 30 1987		Order extending time to file brief of respondent on the merits until April 30, 1987.
12	Apr 9 1987		Order further extending time to file brief of respondent on the merits until May 15, 1987.
13	May 11 1987		Record filed.
14	May 12 1987	D	Motion of respondents suggestion of mootness filed.
15	May 12 1987		DISTRIBUTED. May 28, 1987. (Respondents' suggestion of mootness).
16	May 12 1987		Record filed.
17	May 12 1987		Certified copy of appendix, 2 volumes, and partial proceedings received.
18	May 15 1987		Brief of respondents Theodore DeSantis, et al. filed.
19	May 15 1987	G	Motion of American Civil Liberties Union Foundation, et al. for leave to file a brief as amici curiae filed.
20	May 22 1987		Opposition of petitioners to motion of respondents filed.
22	Jun 1 1987		Motion of American Civil Liberties Union Foundation, et al. for leave to file a brief as amici curiae GRANTED.
23	Jun 1 1987		DISTRIBUTED. June 4, 1987. (Respondents' suggestion of mootness).
24	Jun 8 1987		Motion of respondents suggestion of mootness DENIED.
25	Jul 20 1987		SET FOR ARGUMENT. Wednesday, October 14, 1987. (4th case).
26	Jul 27 1987		CIRCULATED.
27	Sep 3 1987	X	Reply brief of petitioners Dean Deakins, et al. filed.



**PETITION  
FOR WRIT OF  
CERTIORARI**

86-890

Supreme Court, U.S.  
FILED

NOV 26 1986

No. —

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

DEAN DEAKINS, New Jersey Division of Criminal Justice; IRVING DUBOW, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; RONALD LEHMAN, New Jersey State Police; ALBERT G. PALENTCHAR, New Jersey Division of Criminal Justice; DONALD A. PANFILE, New Jersey Department of Treasury; WALTER PRICE, New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundation & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice,

*Petitioners,*

vs.

WILLIAM MONAGHAN, THEODORE DESANTIS,  
JOHN JAMES, FOUNDATIONS & STRUCTURES, INC.,  
WILLIAM E. MONAGHAN ASSOCIATES, AND  
MJD CONSTRUCTION COMPANY, INC.,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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# QUESTIONS PRESENTED FOR REVIEW

1. Must federal courts, by virtue of a 42 U.S.C. sec. 1983 action for the return of property seized pursuant to a warrant, filed by the targets of an ongoing state grand jury investigation, intrude into that investigation despite the *Younger* abstention doctrine where the federal complainants may seek redress from the state court which supervised the grand jury and issued the warrant?

2. Are federal courts absolutely barred from exercising their discretion to dismiss an ancillary claim for damages when they properly abstain from the equitable portion of a 42 U.S.C. sec. 1983 action?

## PARTIES BELOW

All parties below are parties to this petition.

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IN THE  
**Supreme Court of the United States**  
 OCTOBER TERM, 1986

\_\_\_\_\_  
 No. \_\_\_\_  
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DEAN DEAKINS, New Jersey Division of Criminal Justice;  
 IRVING DUBOW, New Jersey Division of Criminal Justice;  
 ROBERT GRAY, New Jersey Division of Criminal Justice;  
 RONALD LEHMAN, New Jersey State Police; Albert G.  
 PALENTCHAR, New Jersey Division of Criminal Justice;  
 DONALD A. PANFILE, New Jersey Department of Treasury;  
 WALTER PRICE, New Jersey Division of Criminal Justice;  
 WILLIAM SOUTHWICK, New Jersey Division of Criminal Jus-  
 tice; RONALD SOST, New Jersey Division of Criminal Jus-  
 tice; JOHN DOE, an individual co-ordinating a search of the  
 premises of Foundation & Structures, Inc.; JOHN DOE, an  
 individual supervising investigators in the New Jersey Di-  
 vision of Criminal Justice; and John Doe, an individual  
 training investigators in the New Jersey Division of Crim-  
 inal Justice,

*Petitioners,*

vs.

WILLIAM MONAGHAN, THEODORE DESANTIS,  
 JOHN JAMES, FOUNDATIONS & STRUCTURES, INC.,  
 WILLIAM E. MONAGHAN ASSOCIATES, and  
 MJD CONSTRUCTION COMPANY, INC.,

*Respondents.*

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI TO THE  
 UNITED STATES COURT OF APPEALS  
 FOR THE THIRD CIRCUIT**  
 \_\_\_\_\_



The petitioners, Dean Deakins, Irving Dubow, Robert Gray, Ronald Lehman, Albert G. Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and three John Doe state law enforcement employees respectfully pray that a writ of *certiorari* issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on July 31, 1986.

### OPINIONS BELOW

The Order and written opinion of the United States District Court for the District of New Jersey is reproduced as Appendix B.

The written opinion of the United States Court of Appeals for the Third Circuit, published at 798 F.2d 632 (3d Cir. 1986), is reproduced as Appendix D.

The Order of the United States Court of Appeals for the Third Circuit denying the petition for an en banc rehearing is reproduced as Appendix E.

The amended Order of the United States Court of Appeals for the Third Circuit denying the petition for an en banc rehearing is reproduced as Appendix F.

### JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. sec. 1331, respondents filed a complaint in the United States District Court for the District of New Jersey.

Respondents filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit under 28 U.S.C. secs. 1291 and 1292(a). The United States Court of Appeals for the Third Circuit filed its opinion on July 31, 1986.

Thereafter, petitioners filed a timely petition for an en banc rehearing under *Fed. R. App. P.* 35(b) and 40(a). The United States Court of Appeals for the Third Circuit denied that petition in an order filed August 29, 1986. Thereafter, the court issued an amended order, filed September 4, 1986, to substitute for its order of August 29, 1986.

The jurisdiction of this Court to review the order of the United States Court of Appeals for the Third Circuit is invoked under 28 U.S.C. sec. 1254(a).

### STATUTES INVOLVED

#### 42 U.S.C. sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

### RULES INVOLVED

#### NEW JERSEY COURT RULE 3:5-7(a)

**3:5-7. Motion to Suppress Evidence and for Return of Property**

**(a) Notice; Time.** On notice to the prosecutor of the county in which the matter is pending or threatened, to the applicant for the warrant if the search was with a warrant, and to co-indictees, if any, and in accordance with the applicable provisions of *R. 1:6-3* and *R. 3:10*, a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding, may apply to the Superior Court only and in the county in which the matter is pending or threatened to suppress the evidence and for the return of the property seized even though the offense charged or to be charged may be within the jurisdiction of a municipal court. Such motion shall be made within 30 days after the initial plea to the charge unless the court, for good cause shown, enlarges the time. A motion made before the trial shall be determined before trial. The motion may be made after trial has commenced only if the trial court finds that defendant could not reasonably have made it prior thereto.

#### STATEMENT OF THE CASE

Over the strong dissent of the Honorable Arlin M. Adams, U.S.C.J., the United States Court of Appeals for the Third Circuit reversed the district court and held that the abstention doctrine was inapplicable to the instant case where respondents (targets of a state grand jury investigation) seek return of seized property. (App. D). In a six to four split decision, the court denied the petition for rehearing. (App. F).

On October 4, 1984, the Honorable Samuel D. Lenox, Jr., Assignment Judge of the Superior Court of New Jersey, Mercer County, who had been assigned the responsibility of supervising the state grand jury, issued a warrant authorizing state police officers and investigators (petitioners in this matter) to search the premises of respondent Foundations & Structures, Inc. for evidence of theft, bribery, and tampering with records. On October 5, 1984, petitioners executed the warrant and served three state grand jury subpoenas on respondent Theodore DeSantis requiring the production of certain records. These incidents gave rise to the federal complaint of respondents William Monaghan, Theodore Desantis, John James, Foundation & Structures, Inc., William E. Monaghan Associates, and MJD Construction Company, Inc.

At the time of the search, respondents protested that the inventory list was inadequate. To resolve the dispute, the parties telephoned Judge Lenox, who ordered all of the documents placed under seal pending a determination of the adequacy of the list.

On December 26, 1984, respondents filed the instant federal complaint, under 42 U.S.C. sec. 1983, alleging abridgments of their rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments, as well as stating several pendent claims under state tort law. Respondents sought a preliminary injunction requiring petitioners to return all seized documents that were privileged or beyond the scope of the warrant, and a permanent injunction requiring the return of all documents. Respondents also sought preliminary and permanent injunctions against future unreasonable searches and seizures, compensatory and punitive



damages, and attorneys fees.<sup>1</sup> On January 28, 1985, petitioners moved to dismiss the case under *Younger v. Harris*, 401 U.S. 37 (1971). On February 15, 1985, respondents again moved for preliminary injunctive relief.

On February 19, 1985, while the federal court proceedings remained in the pleadings stage, petitioners returned to Judge Lenox and obtained an *ex parte* order to show cause why certain documents, sealed pending resolution of respondents' claim to attorney-client and work-product privileges, should not be opened. On March 11, 1985, in denying respondents' motion to quash that order, Judge Lenox stated that, in ordering the initial sealing on October 5, 1984, he had contemplated the parties' return to resolve all disputes regarding the propriety of the seizure. Judge Lenox also pointed out to respondents that they could raise their Fourth Amendment claim in the state proceedings by filing a motion for return of documents, pursuant to *New Jersey Court Rule 3:5-7(a)*.

On March 8, 1985, after hearing oral argument on petitioners' motion to dismiss under *Younger* and on respondents' request for preliminary relief, the federal district court ordered that all discovery be stayed, and that, pending a further decision by the court on the *Younger* issue, the disputed documents would remain sealed. A written order to this effect was filed on April 2, 1985. (App. A).

<sup>1</sup> The substance of respondents' complaint was summarized in the majority opinion of the United States Court of Appeals. (App. D, pp. 21a to 24a). For the sake of brevity, and to avoid needless duplication, petitioners have not included the complaint in the appendix.

On March 25, 1985, Judge Lenox held a second state court proceeding on the order to show cause. At that proceeding, respondents themselves raised the issue whether some of the documents were subject to suppression or were beyond the scope of the warrant. Judge Lenox again informed respondents that they could file a motion pursuant to *New Jersey Court Rule 3:5-7(a)*.

On August 6, 1985, the Honorable Stanley S. Brotman, U.S.D.J., denied respondents' request for a preliminary injunction and dismissed the action under *Younger*. (App. B). On December 30, 1985, respondents DeSantis and Monaghan were informed that they were targets of the state grand jury investigation.

On July 31, 1986, the United States Court of Appeals for the Third Circuit, by a majority opinion, reversed the district court and held that the abstention doctrine was inapplicable to the instant case where respondents (targets of a state grand jury investigation) seek return of seized property. (App. D). The court reversed the dismissal of the complaint, but affirmed the denial of the preliminary injunction. The court held that even if abstention had been proper, the district court should have stayed, rather than dismissed, respondents' claim for money damages. The Honorable Arlin M. Adams, U.S.C.J., concurred as to the affirmance of the denial of the preliminary injunction and the reinstatement of the complaint insofar as it sought money damages, but strongly dissented as to the abstention issue and the majority's judgment that the matter should be remanded for a trial on respondents' claim for the return

of grand jury documents.<sup>2</sup> (App. D, pp. 33a, 37a to 44a).

On August 14, 1986, petitioners petitioned for an en banc rehearing of the majority's reversal of the district court order regarding the return of the grand jury documents. This petition was denied in an order filed August 29, 1986 (App. E) and again in an amended, substitute order filed September 4, 1986. (App. F). The vote on the latter order was six to four. In particular, four Judges: Judges Arlin M. Adams, U.S.C.J., Collins J. Seitz, U.S.C.J., Joseph F. Weis, U.S.C.J., Edward R. Becker, U.S.C.J., dissented, with Judge Adams writing a separate statement. (App. F).

### REASONS FOR GRANTING THE WRIT

#### A. The Third Circuit Erred in Reversing the District Court's Decision to Abstain.

Respondents, the subjects of a state grand jury investigation, filed a 42 U.S.C. sec. 1983 action demanding, *inter alia*, the return of property seized

<sup>2</sup> Although it is not part of the record, this Court should be aware that on September 10, 1986, the state grand jury returned an indictment against some of the respondents, namely, William Monaghan, Theodore DeSantis, Foundation & Structures Inc., as well as other criminal defendants not parties to the instant federal action.

Respondents clearly have not agreed that this development eliminates the need for the district court to comply with the mandate of the Third Circuit which is the subject of the present petition. The return of the indictment does, however, demonstrate that the investigation was conducted in good faith and that many of the contentions raised in respondents' complaint are frivolous.

pursuant to a search warrant. Petitioners, referring both to state law which provided a mechanism for obtaining the return of illegally seized property, and also to the state judge who supervised the grand jury, issued the warrant, and explicitly invited respondents to invoke that mechanism, requested abstention under *Younger v. Harris*, 401 U.S. 37 (1971). The Third Circuit, over a strong dissent, reversed the judgment of the district court and ruled that abstention was not permissible. Petitioners' motion for a rehearing on the very issue raised in this petition was denied by a vote of six to four. The decision of the Third Circuit is in conflict with the decision of at least two other circuits. (See pp. 13-16 below).

This is an extremely important federal issue. Incredibly, the Third Circuit has not only permitted, but has actually required that, at the request of potential criminal defendants, federal district courts must become involved in all state grand jury investigations in which an indictment has not yet been returned. In barring *Younger* abstention in these circumstances, the court of appeals has created a mechanism by which disgruntled subjects of state grand jury investigations can "unduly obstruct [these] proceedings and in some cases abort them." (App. E, dissent by Judge Adams).

Initially it is worthy of note that the State of New Jersey provides all persons who have allegedly been subjected to illegal searches and seizures with the means to obtain the immediate return of their property, even if an indictment has not yet been returned.<sup>3</sup>

<sup>3</sup> Either a motion under *New Jersey Court Rule 3:5-7(a)* or an action in replevin would be suitable for this purpose.



Thus, in this case there existed both a pending grand jury investigation and a means within the state system to redress any illegality which may have occurred without federal intrusion into and disruption of the criminal investigation. Other federal circuit and district courts have allowed abstention on the basis of state grand jury proceedings even when those proceedings did not provide their subjects with an immediate means to resolve their federal claims. The Third Circuit has ignored the interests of federalism and written new law which will interfere with state criminal investigations. This cannot be countenanced.

It is important to note that the court below conceded that most of the elements of the *Younger* abstention doctrine were met in this case. For example, the court acknowledged that grand jury proceedings are certainly matters of importance to the state (App. D, p. 30a), and that respondents' demanded relief would be sufficiently disruptive of those proceedings to warrant *Younger* abstention, provided that all of the elements of the doctrine were otherwise established. (App. D, p. 28a). The court furthermore conceded that respondents had available state procedures by which, without waiting to be indicted, they could immediately seek a state court adjudication of their federal claims. (App. D, pp. 30a to 31a and note 7).

Nevertheless, the court concluded that this was not enough. The court stated, "[I]n no case has the Supreme Court or this court ever turned the propriety of a *Younger* dismissal upon the mere availability of a State judicial proceeding." (App. D, pp. 30a to 31a). This conclusion, quite simply, is wrong. This Court has done precisely that in several opinions, including its recent opinion in *Ohio Civil Rights Comm'n v.*

*Dayton Schools, Inc.*, — U.S. —, 106 S.Ct. 2718 (1986), which the majority opinion did not cite, and upon which the dissenting opinion relied. This petition for a writ of *certiorari* will establish that the court erred, that the question is one of great importance, and that these factors, together with the conflict between decisions of courts of appeals (and of lower courts) warrant this Court's granting of the writ.

Initially, the error in the court's reasoning is manifest from a comparison of the caselaw which it cited with the caselaw which it did not cite. In short, it cited to, relied upon, but misinterpreted *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), but it failed to cite to or rely upon *Ohio Civil Rights Comm'n*, in which this Court clarified the *Hawaii Housing Authority* case. The court held that "*Younger* abstention is appropriate only where there is pending a proceeding in which a state court will have the authority to *adjudicate* the merits of a federal plaintiff's federal claims." (App. D, p. 29a, emphasis in the original). The court concluded that a grand jury proceeding is not such a proceeding because it is *ex parte* and can adjudicate nothing. *Id.* The court relied upon *Hawaii Housing Authority* to conclude that "the mere availability of a state judicial proceeding" (App. D, p. 31a) did not suffice to overcome the grand jury's inability to adjudicate the merits of respondents' federal claims.

The reasoning of the majority was faulty and cannot stand under the decision in *Ohio Civil Rights Comm'n*. First, the court's reliance upon *Hawaii Housing Authority* was misplaced. Nothing in that opinion discussed the availability of a state judicial remedy under the laws of Hawaii to correct the con-

stitutional errors which the Housing Authority might commit. More to the point, in *Ohio Civil Rights Comm'n*, this Court limited the *Hawaii Housing Authority* holding and clarified that it stands only for the proposition: "if state law expressly indicates that the administrative proceedings are not even 'judicial in nature,' abstention may not be appropriate." *Ohio Civil Rights Comm'n*, \_\_\_ U.S. at \_\_\_, 106 S.Ct. at 2723 n.2. That limited fact pattern suggesting abstention might be improper is not applicable here. As the district court recognized, in New Jersey "grand juries have always been considered an arm of the court; they perform a quasi-judicial function in our present judicial structure." (App. B, p. 16a). The district court's interpretation of state law was clearly correct. See, e.g., *State v. Smith*, 102 N.J. Super. 325, 336, 246 A.2d 35, 41 (Law Div. 1968), *aff'd* 55 N.J. 476, 262 A.2d 868 (1968), *cert. denied* 400 U.S. 949 (1970).

Moreover, the Third Circuit's reasoning was rejected by this Court in *Ohio Civil Rights Comm'n*. According to that opinion, *Younger* applies where "important state interests are involved." *Ohio Civil Rights Comm'n*, \_\_\_ U.S. at \_\_\_, 106 S.Ct. at 2723. It applies even to "state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." *Id.* The circuit court's concern that the state grand jury cannot litigate respondents' Fourth Amendment claims is of no moment. Plaintiffs in *Ohio Civil Rights Comm'n* expressed the same concern with respect to the Ohio Civil Rights Commission. This Court responded that

"it is sufficient . . . that constitutional claims may be raised in state court judicial review . . . ." *Id.* at 2724. Thus, as Judge Adams noted in his dissent, this Court's holding emphasized that "even if the administrative proceedings would not provide a forum for resolution of constitutional claims, state judicial review of any agency decision would be sufficient for protection of any constitutional interests." (App. D, p. 38a). This holding fully applies to this case and is directly at odds with the instant Circuit Court opinion. It must also be remembered that in this case an action was invited by the very judge who signed the search warrant and who presides over the state grand jury.

Instructive in this regard is the recent opinion of the United States Court of Appeals for the Fourth Circuit in *Potomac Electric Power Company v. Sachs et al.*, Nos. 86-1572, 86-1573 (4th Cir. October 17, 1986) (available on LEXIS, Genfed library, USAPP file), which is in direct conflict with the Third Circuit's opinion in the present case. In that case the plaintiff Potomac Electric Power Company (hereinafter referred to as "PEPCO") sought a declaratory judgment that the federal Toxic Substances Control Act preempted Maryland law. However, in the district court it was established that the State of Maryland had initiated a grand jury proceeding to investigate whether plaintiff PEPCO had violated Maryland's criminal laws and regulations governing hazardous waste disposal, and that these proceedings were in progress at the time the district court action was filed. The district court refused to abstain because of its conclusion that there was no adequate opportunity for plaintiff PEPCO to raise its preemption claim be-



fore the grand jury. Moreover, since it was possible that PEPCO would not be indicted, the district court concluded that it was possible that PEPCO would never be able to present its federal claim in state court. The United States Court of Appeals for the Fourth Circuit disagreed noting that this Court's opinions

demonstrate that not only is the immediate proceeding relevant in determining whether there is an opportunity to present a federal claim, but subsequent state judicial proceedings in which the claim can be raised are also relevant. Grand jury investigation and indictment initiate a criminal prosecution in Maryland's system of criminal enforcement. If indicted, PEPCO can present its claim of federal preemption . . . as a defense to the criminal prosecution, and therefore has an adequate opportunity to present the claim in the ongoing proceedings.

Slip op. at 8.

The abstention holding adopted by the court in *Potomac Electric Power Company* is not unique. On the contrary, the Third Circuit's opinion in this case is virtually unique among those courts which have addressed the issue whether the *Younger* abstention doctrine should apply to state grand jury proceedings. For example, in *Kaylor v. Fields*, 661 F.2d 1177 (8th Cir. 1981), the court was faced with a situation in which plaintiffs had brought suit under 28 U.S.C. sec. 1983 to enjoin a state prosecutor from enforcing subpoenas he had issued pursuant to a state investigation. The court first noted that *Younger* prohibits

federal courts from interfering with state court criminal proceedings. The court then ruled that since under Arkansas law a prosecutor takes the place of a grand jury, the issuance of the subpoena was part of a state criminal action. Since plaintiffs had the opportunity to present their claims in relation to this proceeding in the state courts, abstention was required. *Kaylor*, 661 F.2d at 1181-1182.

The *Kaylor* court cited with approval the decision in *Notey v. Haynes*, 418 F.Supp. 1320 (E.D.N.Y. 1976). In *Notey* the court, reviewing requests for injunctive and declaratory relief in regard to a matter which was then pending before a state grand jury, stated:

In other words, when a grand jury has been impanelled and is sitting and investigating, there is a "criminal case" and in New York a criminal proceeding, and most significantly there is the State court responsible for and having jurisdiction of such grand jury from which relief from constitutional abuses may be obtained. Interference with such state criminal proceedings would appear clearly to be within the prohibitions contemplated by *Younger* and its progeny.

*Notey*, 418 F.Supp. at 1326; see also *Craig v. Barney*, 678 F.2d 1200 (4th Cir. 1982), *cert. denied* 459 U.S. 860 (1982).

Thus, the Third Circuit's opinion in this case is contrary to the general rule that grand jury proceedings are pending state proceedings for the purposes of *Younger* abstention. The only caveat to this general rule, that there must be a state forum in which recourse is immediately available, has been met

in this case. See *Brennick v. Hynes*, 471 F.Supp. 863, 867 (N.D.N.Y. 1979). As noted, the Fourth Circuit in the *Potomac Electric Power Company* case found even this caveat inapplicable.

Prior to the court's opinion in this case, no court has held abstention inappropriate when a state judiciary is immediately available and has explicitly expressed its willingness to adjudicate the complainant's federal claims. The conflict between this opinion and those of previous courts is likely to confuse the development of the caselaw on this important question and manifests the necessity for this Court to grant the writ.

There is no doubt that this is an important question. The *Younger* doctrine was based upon the rationale that federal court interference with pending state proceedings is inconsistent with the principles of federalism and comity, which reflect "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. at 44.

This Court has repeatedly recognized that the state's interest in the unhindered enforcement of its criminal laws is a state interest deserving of the greatest deference in cases posing problems under *Younger*. E.g., *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 572, 604-605 (1975). The grand jury proceedings which are the subject of this case implicate that interest in a very direct manner. Absent this Court's intervention, federal court

involvement on behalf of disgruntled subjects of state grand jury investigations will constitute both an undue interference with and an immense burden upon New Jersey's important interest in investigating criminal conduct within its borders. The federal courts should defer to the state courts with respect to the conduct of this important function. The opinion of the court below which requires interference with that deference must be reversed.

**B. The District Court Had Discretion Either to Dismiss or to Stay the Claim for Money Damages.**

If this Court agrees that abstention was appropriate, the question remains as to the appropriate disposition in the district court. The district court determined that the entire complaint should be dismissed. The circuit court concluded that, if abstention were applicable, then the district court would have been obligated to stay, rather than dismiss respondents' claim for money damages. Contrary to the circuit court's holding, petitioners submit that the district court does have some discretion on this question and that the Third Circuit should have affirmed the district court's decision to dismiss. Succinctly stated, respondents must pursue all of their remedies in the state court system.

The courts of New Jersey provide a forum for suits premised upon 42 U.S.C. sec. 1983 and will award attorneys fees to successful plaintiffs. See, e.g., *Right to Choose v. Byrne*, 91 N.J. 287, 315-318, 450 A.2d 925, 939-941 (1982); *Carmel v. Hillsdale*, 178 N.J. Super. 185, 428 A.2d 548 (App. Div. 1981). In *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 116-117 (1982), this Court considered the willingness of the state court system to entertain such

suits when it ordered the plaintiffs to proceed in the state, rather than the federal court system. Significantly, the courts of New Jersey also provide a forum for respondents' claims against the state officers premised upon state tort principles. These claims, alleging that petitioners, acting under color of state law, violated state law, are foreclosed from adjudication in the federal courts by virtue of the doctrine of *Pennhurst State School Hosp. v. Hilderman*, 465 U.S. 89 (1984). Thus, these claims must be adjudicated in the state court system. It is, of course, preferable for a single court to adjudicate all related claims.

Moreover, a stay, rather than a dismissal, may result in federal court interference with the pending state criminal action. For example, in those cases where an indictment is not promptly returned, plaintiff will urge the district court to lift the stay. The district court may then be compelled to adjudicate whether the state officials are intentionally dilatory, which might require disclosure of the status of the grand jury proceedings and the necessity to pierce their secrecy. This result is incompatible with the principles of abstention.

For these reasons, the district court had the discretion to dismiss rather than to stay the complaint. The Third Circuit should have affirmed the district court's judgment.

### CONCLUSION

Based upon the foregoing reasons this petition for *certiorari* should be granted. The filing of a 42 U.S.C. sec. 1983 action by targets of an ongoing state grand jury investigation does not require federal court intrusion into that investigation where the federal com-

plainants may seek redress from the state court which supervised the grand jury and issued the warrant. The circuit court should have affirmed the judgment of the district court.

Respectfully submitted,

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*Attorney for Petitioners*

ALLAN J. NODES  
Deputy Attorney General  
*Attorney of Record*

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Division of Criminal Justice  
Appellate Section

Of Counsel and on the Petition

DATED: November 26, 1986



## APPENDIX

**APPENDIX A**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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Newark, New Jersey 07102  
Attorneys for Theodore DeSantis and  
Co-Counsel for John James, Foundations & Structures,  
Inc., William E. Monaghan Associates and MJD Con-  
struction Company, Inc.

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**Civil Action  
No. 84-5369 (SSB)**

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WILLIAM MONAGHAN, THEODORE DESANTIS, et al.,  
*Plaintiffs,*

v.

DEAN DEAKINS, New Jersey Division of Criminal Justice;  
et al.,

*Defendants.*

**ORDER**

This matter having been opened to Court by the State  
of New Jersey, Division of Criminal Justice, Appellate Sec-  
tion attorneys for defendants, Allan J. Nodes and Larry

Etzweiler appearing, for an order dismissing the Complaint, or in the alternative, limiting discovery, and Clapp & Eisenberg, professional corporation, and McGahn, Friss & Miller, attorney and co-counsel for plaintiffs, having cross-moved for return of documents improperly seized during execution of a search warrant on the premises of Foundations & Structures, Inc. on October 5, 1984, and the Court having considered the legal memoranda and affidavits submitted, and having heard the oral argument of counsel appearing in support and opposition thereto, and the Court having reserved decision on the respective applications of the parties, and

It appearing that depositions in this matter have been noticed by the plaintiffs for March 13, 1985, and March 14, 1985, and

It appearing further that certain of the documents which are the subject of plaintiffs' cross-motion have been sealed by consent of counsel and

It appearing further that it is in the interest of justice to preserve the status quo pending a decision by this Court of the motions pending before it, and for good cause shown

IT IS on this 25th day of March, 1985

ORDERED, that the depositions previously noticed shall be stayed pending a said decision; and it is further

ORDERED, that the State of New Jersey, Division of Criminal Justice shall not unseal the documents sealed by consent of counsel pending said decision.

/s/ STANLEY S. BROTMAN  
STANLEY S. BROTMAN, U.S.D.J.

## APPENDIX B

### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 84-5369

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES,  
FOUNDATIONS & STRUCTURES, INC., WILLIAM E. MONAGHAN  
ASSOCIATES, and MJD CONSTRUCTION COMPANY, INC.,  
*Plaintiffs,*

v.

DEAN DEAKINS, New Jersey Division of Criminal Justice; IRVING DUBOW, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; RONALD LEHMAN, New Jersey State Police; ALBERT G. PALENTCHAR, New Jersey Division of Criminal Justice; DONALD A. PANFILE, New Jersey Department of Treasury; WALTER PRICE, New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundations & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice,  
*Defendants.*

### ORDER

This matter having come before the court on the 8th day of March, 1985; and

The court having considered the submissions and arguments of the parties; and

For the reasons stated in the court's opinion filed this date,



It is on this 6th day of August, 1985, thereby ORDERED that defendants' motion to dismiss this complaint is GRANTED.

No costs.

/s/

STANLEY S. BROTMAN, U.S.D.J.

# NOT FOR PUBLICATION

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 84-5369

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES, FOUNDATIONS & STRUCTURES, INC., WILLIAM E. MONAGHAN ASSOCIATES, and MJD CONSTRUCTION COMPANY, INC.,  
*Plaintiffs,*

v.

DEAN DEAKINS, New Jersey Division of Criminal Justice; IRVING DUBOW, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; RONALD LEHMAN, New Jersey State Police; ALBERT G. PALENTCHAR, New Jersey Division of Criminal Justice; DONALD A. PANFILE, New Jersey Department of Treasury; WALTER PRICE, New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundations & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice,

*Defendants.*

## OPINION

### APPEARANCES:

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Attorneys for Defendants

BROTMAN, District Judge

Plaintiffs William Monaghan, Theodore DeSantis, John James, Foundations & Structures, Inc., William E. Monaghan Associates, and MJD Construction Company, Inc., bring this action against defendants, who include seven investigators of the New Jersey Division of Criminal Justice, one investigator of the New Jersey Department of the Treasury, one investigator of the New Jersey State Police, and three "John Does," their supervisors and trainers, sued in their individual capacities under the Civil Rights Act of 1964, 42 U.S.C. § 1983. Plaintiffs also assert several state law claims. This court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343, and under the principles of pendent jurisdiction.

## I. Factual Background

What follows below is a chronological summary of the factual history of this litigation in both the federal and state fora.

On October 4, 1984, the Honorable Samuel D. Lenox, Jr., Assignment Judge of the Superior Court of New Jersey, Mercer County, issued a warrant authorizing members of the New Jersey State Police and the State Investigators of the Division of Criminal Justice to search for evidence of various criminal activities such as theft, bribery, and tampering with records at Foundations & Structures, Inc., in Tuckahoe, New Jersey. Affidavit of Julian Wilsey, Deputy Attorney General, February 19, 1985, at ¶ 2. The warrant was based upon the sworn application of State Investigator Albert G. Palentchar. *Id.* On October 5, 1984, defendants, all state law enforcement officers, executed this warrant. During the search, as defendants placed the seized materials into cartons for loading onto the evidence truck, plaintiff's lawyers Edward N. Fitzpatrick and Patrick T. McGahn, Jr. examined the inventory and took exception to its adequacy. *Id.* at ¶ 5. To resolve the matter, the parties placed a telephone call to Judge Lenox. The Judge suggested that they seal the disputed cartons pending further litigation before him as to the adequacy of the inventory. The cartons were sealed and taken to the evidence vault at the Division of Criminal Justice in Trenton, New Jersey. *Id.* at ¶ 6; Affidavit of Patrick T. McGahn, Jr., February 14, 1985, at ¶ 4.

On or about the date the search warrant was executed, three State Grand Jury *subpoenae duces tecum* were served on Mr. Theodore DeSantis. The first two subpoena(e) called for the production of records on the part of the two corporate entities referred to in the warrant, Foundations and Structures, Inc. and Monaghan Associates. Affidavit of Julian Wilsey, Deputy Attorney General, March 1, 1985, at ¶ 1. The records and documents sought by the subpoenae

paralleled the documents seized by the state at Foundations & Structures, Inc., with the exception that the subpoenae included documents after September 8, 1978. *Id.* See also Plaintiffs' Complaint at ¶ 8 (Subpoenae "list as documents to be produced essentially the same documents listed on the warrant"). Plaintiffs responded to the two State Grand Jury subpoenae, by arguing that many of the documents requested were already in the possession of the state pursuant to the execution of its search warrant. Wilsey Affidavit at ¶ 3. The third subpoena, as well as a fourth served after October 5, 1984, were withdrawn by the state on November 15, 1984 during a hearing before Judge Lenox. *Id.*; Affidavit of McGahn at ¶ 5.

On October 15, 1984, Wilsey sent a letter to plaintiffs' counsel which advised them that they could send a representative to prepare a detailed list of items seized on October 5, 1984. Wilsey told counsel that the state would return any items seized which exceeded the scope of the warrant and that the state would provide copies of the documents necessary for plaintiffs to conduct the business affairs of the corporate subjects of the search. Affidavit of Wilsey, March 1, 1985, at ¶ 2. On October 23, 1984, plaintiffs were permitted to break the seals on the boxes of documents and examine their contents. Affidavit of Donofrio at ¶¶ 2, 4. Many documents were disputed, either on grounds that they were outside the scope of the search warrant or because they were protected by an attorney-client or an attorney work product privilege. *Id.* at ¶ 5. The disputed documents were sealed pending Judge Lenox's resolution of the objections. Defendants claim that the disputed documents comprise carton seven, and parts of cartons eight and nine. Affidavit of Wilsey at ¶ 9. Plaintiffs claim that the disputed documents include parts of cartons seven, nine, ten, eleven, and twelve. Affidavit of Donofrio at ¶ 6.

Plaintiffs further claim that they have not had sufficient access to these documents. This has impeded the ability

of Foundations & Structures, Inc. to conduct business. Affidavit of Frederick Essl, Office Manager, Foundations & Structures, Inc., February 13, 1985, at ¶¶ 2-6; Affidavit of William E. Monaghan, February 14, 1985, at ¶¶ 2-9. Specifically, plaintiffs claim that they had difficulty securing access to these files on December 13 and 14, 1984. Affidavit of Sharon Donofrio, February 13, 1985, at ¶ 8.

On December 26, 1984, plaintiffs filed this civil rights action under 28 U.S.C. § 1983. Specifically, plaintiffs allege that defendants carted away hundreds of documents which exceeded the scope of the warrant, that the search constituted an improper attempt to coerce plaintiffs into cooperating with an ongoing state criminal investigation, that defendants unreasonably refused to defer to the advice of employees of F&S as to the location of documents sought, that persons on the premises were illegally detained, that vehicles were illegally searched, that defendants conducted themselves "rudely and arrogantly" and that defendants did not give plaintiffs a complete and proper inventory of the documents seized. Based on these allegations, plaintiffs assert claims under 42 U.S.C. § 1983 for (1) illegal search and seizure (Count I), (2) unlawful motivation for conducting the search (Count II), (3) deprivation of their right to counsel and right to freedom from self-incrimination (Count III) and (4) illegal arrest and detention (Count IV). Plaintiffs also seek relief against the three "John Doe" defendants on grounds that they failed to properly train and supervise defendants (Counts I, II, III, VII, IX, and X). Relying on pendent jurisdiction, plaintiffs also claim state law causes of action arising under the common law of the state of New Jersey for trespass (Count IV), conversion (Count V), unlawful confinement (Count VI), and the intentional or reckless infliction of emotional distress (Count VIII). Plaintiffs seek compensatory and punitive damages, and an injunction requiring the return of all documents and proscribing future tortious conduct.



On February 19, 1985, the state moved before Judge Lenox for an Order to Show Cause returnable March 11, 1985, compelling plaintiffs to show cause as to why the sealed documents should not be unsealed. On March 8, 1985, this court heard oral argument on defendants' motion to dismiss this civil rights complaint and plaintiffs' motion for the return of documents and for injunctive relief. This court reserved its opinion on the motions until today, but stayed all discovery in the federal action pending the court's decision.

On March 11, 1985, Judge Lenox heard and denied plaintiffs' motion to quash the Order to Show Cause and ordered plaintiffs to file briefs addressed to the merits of the state's application. On March 25, 1985, Judge Lenox ordered that plaintiffs be permitted to make copies of the sealed documents and ordered further submissions as to which documents were protected by attorney-client and work-product privileges. Judge Lenox ruled that the state could request a plenary hearing to challenge specific factual assertions in the affidavits and further ordered that the disputed documents be submitted to a Special Master before final review by the state court. No determination has yet been made by Judge Lenox as to the sealed documents.

## II. Discussion

This court is urged by defendants to find that *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny require abstention from further review of this matter. The district courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). However, it is equally true that in the interest of comity, the district courts must abstain from exercising that jurisdiction when federal intervention will result in substantial and disruptive interference with concurrent state proceedings. *Younger, supra*; *Moore v. Sims*, 422

U.S. 415 (1979); *Huffman v. Pursire, Ltd.*, 420 U.S. 592 (1975); *Williams v. RedBank Board of Education*, 622 F.2d 1008 (3rd Cir. 1981); *Bally Manufacturing Corp. v. Casino Control Commission*, 534 F. Supp. 1213 (D.N.J. 1982). *Younger* rests on the notion of "comity," that is,

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of state governments and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

*Id.* at 44. There is a strong federal policy, therefore, of non-interference with pending state judicial proceedings, especially in the criminal context. *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423 (1982). Traditional principles of equity, as well as federal-state comity demand that, "except in carefully circumscribed situations, the federal courts should not disrupt an ongoing state judicial process, either by preempting the adjudication of claims that could be brought to the state forum, by directing the state court to stay its proceedings, or by directly interfering in other ways with the natural course of state adjudication. *In re Grand Jury Proceedings*, 654 F.2d 268, 279 (3rd Cir.), *cert. denied*, 454 U.S. 1098 (1981). In *Middlesex County, supra*, the Supreme Court

recently set forth a three part analysis for determining whether a federal court should abstain from interfering in state judicial proceedings. First, there must be an ongoing state judicial proceeding. Second, the proceeding must implicate important state interests. Third, there must be an opportunity in the state proceeding to raise the federal constitutional challenge.

*Coruzzi v. State of New Jersey*, 705 F.2d 688, 690 (3rd Cir. 1983), *citing Middlesex County, supra*, at 432-35.

It is well settled that the exhaustion of state remedies is not a prerequisite to bringing a civil rights action under § 1983. As the Supreme Court said in *Monroe v. Pape*, 365 U.S. 167, 183 (1961), "[t]he federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the federal one is invoked." *Guerro v. Mulhearn*, 498 F.2d 1249, 1252 (3rd Cir. 1974). The *Younger* series of cases does not bar federal intervention pursuant to 42 U.S.C. § 1983 in the absence of pending state judicial proceedings. *Anderson v. Nemetz*, 474 F.2d 814, 819 (1973).

Defendants have represented to this court that there is an ongoing State Grand Jury investigation of plaintiffs. See, e.g., Affidavit of Julian Wilsey, *supra*.<sup>\*</sup> A grand jury investigation constitutes an ongoing state proceeding under New Jersey law and mandates the application of *Younger* principles here. When a grand jury has been empaneled and is sitting and investigating, and most significantly, there is a state court responsible for having jurisdiction over such grand jury from which relief from constitutional abuses may be obtained, "interference with such state criminal proceedings would appear clearly to be within the prohibitions contemplated by *Younger* and its progeny." *Notey v. Hynes*, 418 F. Supp. 1320, 1326 (E.D.N.Y. 1976). The United States Supreme Court has also held that "[a]n investigation by a grand jury is a criminal case 'within the meaning of the Fifth Amendment.'" *United States v. Monia*, 317 U.S. 424, 427 (1943).

<sup>\*</sup> Judge Lenox, in his decision of March 11, 1985, found that "I have an ongoing state proceeding and there is absolutely no reason why the state proceeding should not continue," Transcript of Hearing at p. 38, and "[t]he New Jersey proceedings are criminal in nature. We have an ongoing criminal investigation involving violations of the criminal laws of this State. There is a grand jury in session. The Attorney General has represented that the grand jury is investigating these alleged criminal violations." *Id.* at 38-39.

In *Kaylor v. Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981), a court held that grand jury proceedings constituted state judicial proceedings for the purposes of *Younger*:

Plaintiffs also allege that defendant has subpoenaed papers and documents belonging to them without probable cause and has attempted to compel them to be witnesses against themselves. . . .

The subpoenas in question here were issued pursuant to the prosecuting attorney's subpoena power contained in Ark. Stat. Ann. § 43-801 (1977 Repl). A prosecutor who acts in this capacity in effect "takes the place of a grand jury" under Arkansas law. . . . The issuance of the subpoenas, under Arkansas law, is part of a state proceeding in which the plaintiffs to this action had an opportunity to present their claims. Challenges to such subpoenas can be made by a motion to quash in the state circuit courts, which have general criminal jurisdiction, and rulings on such motions are reviewable by the Arkansas Supreme Court.

*Id.* While plaintiffs do not seek to quash the grand jury subpoenae issued here, they do challenge the state's retention of information and documents obtained pursuant to the search warrant, which, by plaintiffs' own admission involves "essentially the same documents" covered by those subpoenae. Plaintiffs' Complaint at ¶ 8. Either method would achieve the same result — recovery of the documents involved. In essence, therefore, plaintiffs' federal action can also be characterized, in part, as an indirect effort to suppress the use of evidence which they claim has been improperly seized and held by the state. New Jersey has a strong interest in the unencumbered resolution of such an issue by its courts. The admissibility of evidence in state criminal prosecutions is ordinarily a mat-



ter to be resolved by state tribunals, subject of course to review by *certiorari* or on appeal to the Supreme Court. *Perez v. Ledesma*, 401 U.S. 82, 84-85 (1971) (Such federal involvement would effectively "stifle" pending state criminal prosecutions); *Kugler v. Helfant*, 421 U.S. 117, 130 (1975).

New Jersey has a vital interest in the integrity of its court system, and thereby, its criminal justice system. Federal adjudication of the constitutionality of the execution of the search warrant would hinder the orderly course of the state prosecution and encourage piecemeal factual determination of issues which arise out of the course of the state proceedings. In order to deal with the questions of damages and injunctive relief posed by plaintiffs in their federal complaint, the court would have to make rulings that would deeply intrude into the integrity of the ongoing state criminal proceedings before the State grand jury. Questions concerning the effect to be given to any federal court ruling would certainly arise, and could lead to delay or even derailment of the course of the state action. The potential for substantial federal-state friction is obvious. A suit for damages under § 1983 cannot be maintained in federal court where it will have a substantially disruptive effect upon state criminal proceedings. *Guerro v. Mulhearn*, 498 F.2d 1249, 1253 (1st Cir. 1974); *Conover v. Montemuro*, 477 F.2d 1073, 1080 (3rd Cir. 1973) (Such an adjudication of the lawfulness of a search and seizure could, on the basis of collateral estoppel, affect the state prosecution). *Accord Sartin v. Commissioner of Public Safety of the State of Minnesota*, 535 F.2d 430, 433-34 (8th Cir. 1976) (No abstention problem posed where Section 1983 action for money damages will not interfere with a legitimate state activity; state proceedings had already been closed). To countenance such federal intervention into state grand jury proceedings would open the floodgates to innumerable civil rights challenges to the scope of subpoenae and warrants issued therefrom, and under the supervision

of the state courts. See, e.g., Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4252.

Plaintiffs can maintain their federal action only by making a sufficient showing of bad faith or harassment on the part of the state, or of other "extraordinary circumstances." Under these circumstances, the principles of *Younger* would not apply. See *Kugler*, *supra*. Plaintiffs provide only bald face assertions that the state used the search warrant as a pretext to gain plaintiffs' cooperation with the ongoing state investigation and to harass them. The court finds that these allegations are insufficient to call into play the exceptions to *Younger*. Furthermore, even if the court were not to abstain, plaintiffs have not shown sufficient evidence of irreparable injury to justify the injunctive relief requested. See, e.g., *Continental Group, Inc. v. Amoco Insurance Company*, 614 F.2d 351. (3rd Cir. 1980), for a discussion of the factors the court must balance in deciding whether to grant injunctive relief. Plaintiffs claim essentially continuous irreparable harm caused by the state's allegedly illegal retention of certain documents and business records. The court disagrees. Plaintiffs have made a showing of inconvenience, not irreparable harm. Plaintiffs have access to those documents which have not been sealed. Judge Lenox has ordered that plaintiffs be permitted to make copies of any documents kept under seal. Opinion of Judge Lenox, March 25, 1985. Further, the court notes that plaintiffs have elected not to pursue their right to petition Judge Lenox for a swift determination as to the status of the contested documents. Given that plaintiffs remain free to pursue this remedy, this court is hard pressed to justify the use of its equity powers to secure return of the documents.

The parties should pursue their grievances in the state court. The State Grand Jury Act, N.J.S.A. 2A:73A-1 *et seq.*, has established the grand jury as a vehicle for state criminal prosecutions. The Act provides that "[t]here shall be at least one grand jury which shall have jurisdiction



extending throughout the state at all times. Such State grand jury shall be impaneled by an assignment judge of the superior court designated for this purpose by the Chief Justice." N.J.S.A. 2A:73A-2. Juries, "in particular grand juries, have always been considered an arm of the court; they perform a quasi-judicial function in our present judicial structure." *State v. Smith*, 102 N.J. Super. 325, 336 (Law Div. 1968), *aff'd*, 55 N.J. 476, *cert. denied*, 400 U.S. 949 (1970). A State grand jury has the same powers and duties and functions in the same manner as a county grand jury. The law applicable to county grand juries applies equally to state grand juries. The New Jersey Supreme Court promulgates such rules and regulations deemed necessary to govern the grand juries. N.J.S.A. 2A:73A-2. Judicial supervision of the State grand jury is maintained by an assignment judge. N.J.S.A. 2A:73A-6. Judge Lenox has been assigned by the Chief Justice to supervise the State grand jury investigating this matter. N.J. Court Rule 3:6-11(a) & (b). The issues raised in plaintiffs' complaint — the legality of the execution of the warrant and the return of documents seized thereby — can be addressed by the Assignment Judge and the State Court. *See Anderson v. Nemetz*, 474 F.2d 814, 818-19 (9th Cir. 1973); *Brennich v. Hynes*, 471 F. Sup. 863, 867 (N.D.N.Y. 1979). Under New Jersey Court Rule 3:5-7.

a motion for the return of property and to suppress evidence may be made where a matter "is pending or threatened." Such a motion does not depend on the existence of an indictment. *State v. Fioravanti*, 78 N.J. Super. 253 (App. Div. 1963), affirmed in part and vacated in part, 46 N.J. 109 (1965). A similar view is expressed in *In re Fried*, 161 F.2d 453, 458 (2d Cir. 1947) where the court held that if property had been illegally seized by a federal official, "its potential use as evidence will be restrained by the district court, although no indictment is pending." Since

such a motion may be made at the pre-indictment stage, it would logically follow that an application to examine or copy the evidence submitted to justify the issuance of a warrant may likewise be granted at the pre-indictment stage.

*In re Search of C Co. Premises*, 115 N.J. Super. 262, 266 (App. Div. 1971). Plaintiffs need be afforded only an opportunity to fairly pursue their constitutional claims in the state proceedings. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). Judge Lenox has invited plaintiffs to fully assert their grievance before his court and has sealed cartons containing disputed documents pending a hearing. Plaintiff, while disputing the state's retention of these and other documents, have elected not avail themselves of the full opportunity they possess to litigate these matters before Judge Lenox. The court finds that all matters concerning the scope and application of the warrant can and should be adjudicated in state court, including whether items seized exceeded the scope of the warrant, whether an inventory was made available, whether the seized property should be retained, and whether the search constituted an inappropriate pretext. All state law claims raised by plaintiffs can, of course, be pursued in that forum as well.

### III. Conclusion

The principles which underlie *Younger* and its progeny require the equitable abstention of this court, given the facts and circumstances of this case. *See Juidice v. Vail*, 430 U.S. 327, 337 (1976). An appropriate order will be entered.

/s/

STANLEY S. BROTMAN, U.S.D.J.

Dated: August 6, 1985

## APPENDIX C

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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Civil Action No.  
84-5369 (SSB)

---

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES,  
FOUNDATIONS & STRUCTURES, INC., WILLIAM E. MONAGHAN  
ASSOCIATES, and MJD CONSTRUCTION COMPANY, INC.,  
*Plaintiffs,*

v.

DEAN DEAKINS, New Jersey Division of Criminal Justice;  
IRVING DUBOW, New Jersey Division of Criminal Justice;  
ROBERT GRAY, New Jersey Division of Criminal Justice;  
RONALD LEHMAN, New Jersey State Police; ALBERT G.  
PALENTCHAR, New Jersey Division of Criminal Justice;  
DONALD A. PANFILE, New Jersey Department of Treasury;  
WALTER PRICE, New Jersey Division of Criminal Justice;  
WILLIAM SOUTHWICK, New Jersey Division of Criminal Jus-  
tice; RONALD SOST, New Jersey Division of Criminal Jus-  
tice; JOHN DOE, an individual co-ordinating a search of the  
premises of Foundations & Structures, Inc.; JOHN DOE, an  
individual supervising investigators in the New Jersey Di-  
vision of Criminal Justice; and JOHN DOE, an individual  
training investigators in the New Jersey Division of Crim-  
inal Justice,

*Defendants.*

## NOTICE OF APPEAL

Notice is hereby given that William Monaghan, Theodore  
DeSantis, John James, Foundations & Structures, Inc.,  
William E. Monaghan Associates, and MJD Construction  
Company, Inc., plaintiffs above named, hereby appeal to

the United States Court of Appeals for the Third Circuit  
from the order dismissing the complaint in the above  
named action entered on August 6, 1985.

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By: /s/ PATRICK T. MCGAHN  
PATRICK T. MCGAHN, JR.

Date: September 4, 1985

## APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NO. 85-5589

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES,  
FOUNDATIONS & STRUCTURES, INC., WILLIAM E. MONAGHAN  
ASSOCIATES, and MJD CONSTRUCTION COMPANY, INC.,

*Appellants*

v.

DEAN DEAKINS, New Jersey Division of Criminal Justice;  
IRVING DUBROW, New Jersey Division of Criminal Justice;  
ROBERT GRAY, New Jersey Division of Criminal Justice;  
RONALD LEHMAN, New Jersey State Police; ALBERT G.  
PALENTCHAR, New Jersey Division of Criminal Justice;  
DONALD A. PANFILE, New Jersey Department of Treasury;  
WALTER PRICE, New Jersey Division of Criminal Justice;  
WILLIAM SOUTHWICK, New Jersey Division of Criminal Jus-  
tice; RONALD SOST, New Jersey Division of Criminal Jus-  
tice; JOHN DOE, an individual co-ordinating a search of the  
premises of Foundations & Structures, Inc.; JOHN DOE, an  
individual supervising investigators in the New Jersey Di-  
vision of Criminal Justice; and JOHN DOE, an individual  
training investigators in the New Jersey Division of Crim-  
inal Justice

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF NEW  
JERSEY - CAMDEN

(D.C. Civil No. 84-5369)

Argued April 17, 1986

Before: ADAMS, GIBBONS, and STAPLETON,  
Circuit Judges

(Opinion filed July 31, 1986)

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*Attorneys for Appellees*

## OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

Three individuals and three business entities appeal from  
a final order dismissing their complaint against several



officials of the New Jersey Division of Criminal Justice and from the denial of their motion for a preliminary injunction. The plaintiffs-appellants sought damages, permanent injunctive relief, and preliminary injunctive relief. The district court held that the rule of *Younger v. Harris*, 401 U.S. 37 (1971), required dismissal of their complaint. We reverse the order dismissing the complaint but affirm the denial of the plaintiffs' motion for a preliminary injunction.

### I. The Complaint

The complaint alleges that on October 4, 1984 a judge of the Superior Court of New Jersey issued a warrant authorizing officers of the Division of Criminal Justice to search the premises of Foundations and Structures, Inc. (Foundations) in Tuckahoe, New Jersey and to seize certain documents and business records. Foundations, owned by Theodore DeSantis, William Monaghan, and John James, is engaged in the engineering and construction business. Monaghan, DeSantis, and James are also owners of Monaghan Associates and MJD Construction Company, Inc.

About 7:00 a.m. on October 5, 1984 defendants Deakins and Sost, officers of the Division of Criminal Justice, awakened Monaghan at his home. Monaghan previously had testified before a Cape May County grand jury investigating allegations of government corruption in that county, and Deakins and Sost sought Monaghan's cooperation in connection with an investigation of such corruption. Monaghan told them that his attorney had advised him not to answer questions about the subjects under inquiry unless the attorney was present. He then called the attorney and arranged for a meeting with Deakins and Sost later that day. Despite this arrangement, Deakins and Sost threatened to focus their investigation on Monaghan and his businesses if he did not cooperate.

While Deakins and Sost were visiting Monaghan, two other defendants called on DeSantis at a construction site

in Sea Isle City, New Jersey; they also attempted to enlist his cooperation in the corruption investigation. When DeSantis insisted that he would not answer questions unless his attorney were present, these defendants threatened him in the same way Deakins and Sost had threatened Monaghan.

After these early morning attempts to conscript Monaghan and DeSantis had failed, certain other defendants arrived at the premises of Foundations to execute the warrant. Those defendants occupied the premises for nearly eight hours, barricading the entrance to the site with a state vehicle. They searched exiting vehicles, recorded serial numbers of construction machinery on the site, and took photographs. They used the company telephone without authorization and denied such use to others. They required every person—nonemployees included—who happened to be at the multi-acre site to line up and produce identification. Among those detained were Monaghan, DeSantis, and James.<sup>1</sup>

Eventually, the defendants loaded into state vehicles cartons containing hundreds of documents, many of which were not within the scope of the warrant and many of which were necessary to the operation of the business.

<sup>1</sup> While the search warrant was being executed, some of the defendants served on the plaintiffs four subpoenas duces tecum issued by a state grand jury. The records called for in one of these subpoenas were the same as those listed in the search warrant except that some predated those called for by the warrant. Another subpoena was addressed to the custodian of records of Monaghan Associates. A third contained a hand-written list of titles of file folders examined by the defendants during their eight-hour execution of the warrant; the warrant did not authorize the seizure of any of these folders. A fourth subpoena duplicated one of the other three except for its issue date.

On November 1, 1984 Foundations responded to the first subpoena by producing the documents that it requested and that had not already been seized. Plaintiffs subsequently moved to quash two of the other subpoenas, and the state withdrew them.

Among the papers indiscriminately seized were dozens of attorney-client communications, some of which were in a folder plainly marked "Grand Jury" and thus were readily identifiable as such.<sup>2</sup> As of the date of the filing of this opinion, some eighteen months after the October 1984 raid, the state has not indicted or charged any of the plaintiffs, and it retains possession of most of the seized documents.

## II. The District Court Proceedings

On December 26, 1984 the plaintiffs filed in the District of New Jersey a complaint in which they alleged that the October 5 search violated the fourth amendment. They charged that the search was unlawfully motivated in that it sought no information that could not have been obtained in an orderly manner by a subpoena duces tecum and that it was but a pretext designed to coerce Monaghan, DeSantis, and James into cooperating in an investigation the defendants were conducting. The plaintiffs sought return of the seized documents and damages pursuant to section 1983, 42 U.S.C. § 1983 (1982).

The defendants moved for dismissal of the complaint, contending principally that the district court should abstain because of then-ongoing state proceedings. The plaintiffs countered with a motion for a preliminary injunction ordering the return of the documents. In an order dated August 6, 1985 the district court dismissed the plaintiffs' complaint in its entirety. It held that abstention was appropriate and found further that, even if it were not, the

<sup>2</sup> On October 23, 1984 and November 14, 1984 counsel for Foundations and two other representatives of that corporation were allowed access to the sealed boxes for the purpose of making an inventory. During the course of that inventory dozens of documents that are subject to the attorney client or work product privileges were identified. Some of these documents were sealed with the consent of a Deputy Attorney General in the Division of Criminal Justice pending a judicial resolution of the validity of claims of privilege.

plaintiffs did not qualify for a preliminary injunction. *Monaghan v. Deakins*, Civil Action No. 84-5369 (D.N.J. Aug. 6, 1985).

## III. Abstention and Dismissal of the Complaint

The plaintiffs first challenge the district court dismissal, on abstention grounds, of their claims for damages and permanent injunctive relief. Because the district court dismissed the complaint, we must take its allegations to be true.<sup>3</sup> Our review is plenary, and we can affirm only if, assuming the truth of those allegations, the district court could not have granted, as a matter of law, any of the requested relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

### A. The Damage Claim

The plaintiffs urge that whatever else may be said in favor of the order dismissing the complaint, the district court plainly erred in dismissing their claim for money damages and attorney fees. We agree. It is settled in this circuit that a district court, when abstaining from adjudicating a claim for injunctive relief, should stay and not dismiss accompanying claims for damages and attorney fees when such relief is not available from the ongoing state proceedings. *Crane v. Fauver*, 762 F.2d 325, 328-29 (3d Cir. 1985) (reversing district court dismissal of claims for damages and attorney fees); *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1022-24 (3d Cir. 1981) (same). The defendants do not contend that the ongoing

<sup>3</sup> In their appellate brief the defendants concede this:

For purposes of this appeal . . . we assume *arguendo* that the allegations are correct [see Fed. R. of Civ. Proc. 12(b)(6)] and argue that this Court should affirm the District Court's Order dismissing appellants' claims based upon the abstention doctrine.



state proceedings at issue in this case offer the plaintiffs any opportunity to recover either damages or attorney fees. Nonetheless, they offer several arguments in support of the district court's dismissal of the damage claims.

The defendants' principal contention is that the eleventh amendment, as interpreted by the Supreme Court in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 97-124 (1984), bars the district court from awarding damages against them individually, even with respect to alleged violations of the federal Constitution. The state officials neither cite any authority nor proffer any credible argument for such an extreme proposition, and we reject it.

Alternatively, the state urges us to affirm the district court's *Younger*-based dismissal of the damage claim on the ground that the plaintiffs could have asserted that claim in a state tribunal. That, of course, is true of every section 1983 claim, see, e.g., *Maine v. Thibodeaux*, 448 U.S. 1 (1980) (affirming judgment in section 1983 claim brought in Maine state court), and it was true of the damage claims asserted in *Cruze* and *Red Bank*. It, however, is no reason for a district court to abstain from adjudicating a cognizable section 1983 claim.

No argument advanced by the defendant-appellants convinces us that the holdings of *Cruze* and *Red Bank* do not control this case or that those cases are no longer valid. Consequently, we will reverse the district court's dismissal of the plaintiffs' claims for damages and attorney fees.

### B. The Claim for Return of the Property

Whether the district court should have dismissed the plaintiffs' request for return of the seized property presents a closer issue. To resolve this issue, we must decide whether the *Younger* doctrine requires a district court to

abstain in a case in which the federal plaintiff is the target of an ongoing New Jersey state grand jury investigation.<sup>4</sup>

As a preliminary matter, we address the plaintiffs' contention that, because of the type of relief they sought, the *Younger* rule is not applicable in this case. It is true that in most cases in which federal courts have abstained under the *Younger* doctrine the federal plaintiffs sought relief that would have enjoined ongoing state proceedings. And it is undisputed that in this case the plaintiffs did not seek to enjoin any state proceeding but rather simply requested the district court to order the state to return the seized documents. Yet, for the district court to have entertained that request, it would have had to adjudicate the plaintiffs' constitutional claim. The Supreme Court has held that *Younger* bars federal adjudication of constitutional claims if there is a qualifying, ongoing state proceeding in which those claims could be adjudicated, regardless of the relief requested by the federal plaintiff. See *Samuels v. Mackell*, 401 U.S. 66, 73 (1971) (relying on *Younger* to dismiss a claim for declaratory relief and holding that, in cases in which injunctive relief is improper, declaratory relief also is improper); *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 107-15 (1981) (relying on *Samuels* in holding that *Younger* bars district courts from adjudicating section 1983 claims that would require resolution of constitutional issues already before state tribunals). We believe this rule applies to this case and therefore hold that the fact that the plaintiffs sought only a return

<sup>4</sup> The plaintiffs argue on appeal that the district court was clearly erroneous in finding as a matter of fact that they were the subject of a New Jersey grand jury investigation. In support of its finding the district court relied upon two sources—an affidavit filed by a Deputy Attorney General of New Jersey's Division of Criminal Justice and a transcript from a New Jersey state court proceeding, see *Monaghan*, slip op. at 8 & n.\*—but neither of these sources support the finding. However, in light of our resolution of the legal issues presented by this appeal, we do not reach this factual challenge.

of the documents does not except them from *Younger* abstention.

Having concluded this, we move to the principal issue presented by this appeal—whether the existence of the state grand jury proceeding required the district court to abstain under *Younger*. This is an issue of first impression in this court.<sup>5</sup>

In most of the cases in which the Supreme Court has applied the *Younger* rule, the federal plaintiffs were defendants in state civil or criminal proceedings ongoing at the time they filed their federal complaints. See, e.g., *Younger v. Harris*, 401 U.S. 37, 41 (1971) (federal plaintiff was defendant in state criminal action that state was “actually prosecuting” when federal complaint was filed); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 595-98 (1975) (federal plaintiffs were defendants in nuisance action brought by county officials in state court and already adjudicated by state trial court); *Juidice v. Vail*, 430 U.S. 327, 328-30 (1977) (federal plaintiff was judgment debtor from completed state proceeding in which he had refused to participate); *Trainor v. Hernandez*, 431 U.S. 434, 435-38 (1977) (federal plaintiffs were defendants in civil suit ongoing at time they filed federal complaint); *Moore v. Sims*, 442 U.S. 415, 421 (1979) (federal plaintiffs were party to state court, child-custody proceeding at time they filed federal complaint). However, in two cases, *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984), and *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), the federal plaintiffs were not parties to

<sup>5</sup> In *Kaylor v. Fields*, 661 F.2d 1177 (8th Cir. 1981), the Eighth Circuit suggested that a grand jury investigation is a proceeding for which *Younger* abstention was appropriate. See *id.* at 1182. However, in that case, while a criminal charge was pending against one of the two federal plaintiffs, there was no threatened prosecution against the other. Thus the suggestion probably is dictum. In any event the *Kaylor* opinion offers no analysis of the issue.

any trial-like proceeding. Because, according to the complaint in this case, the state has filed no charge, either civil or criminal, against the plaintiffs, such guidance as is available must be found in these two cases.

In *Hawaii Housing* the Supreme Court held that a district court should address the merits of a constitutional challenge to a state condemnation statute even though at the time the federal complaint was filed the state statute compelled the federal plaintiff to participate in a state arbitration proceeding. Writing for the Court, Justice O'Connor stated that, “[s]ince *Younger* is not a bar to federal court action when state judicial proceedings have not themselves commenced, abstention for . . . administrative proceedings [is] not required”, 104 S. Ct. at 2328 (citation to *Middlesex County*, 457 U.S. 433 omitted).

In *Middlesex County* the Court held that *Younger* barred a district court from hearing a constitutional challenge to New Jersey’s attorney-discipline rules when at the time of the filing of the federal complaint the state’s disciplinary organization formally had charged the federal plaintiff with a violation of the rule he sought to challenge in the district court. See 457 U.S. at 437. The Court based its holding on the fact that, although the disciplinary body was not the final arbiter of constitutional claims, its proceedings were, under New Jersey law, part of a judicial proceeding pending in the New Jersey Supreme Court. *Id.* at 433-34.

The holdings and rationales of these cases adumbrate a clear line: *Younger* abstention is appropriate only when there is pending a proceeding in which a state court will have the authority to *adjudicate* the merits of a federal plaintiff’s federal claims. Indeed, the Court emphasized in *Middlesex County* that the critical factor was the availability in the pending state proceeding of an adequate opportunity to adjudicate the constitutional claims raised in the federal litigation, 457 U.S. at 432.

The defendant state officials do not urge that a New Jersey grand jury has the authority to adjudicate anything. A grand jury proceeds *ex parte*. N.J. Crim. Prac. R. 3:6-6. It can issue an indictment, which is no more than a charge that the defendant has violated the criminal law. Only when such a charge is filed does there commence a judicial proceeding that affords the adjudicatory opportunity that *Hawaii Housing* and *Middlesex County* require.<sup>6</sup> No indictment had been returned against the plaintiffs at the time they filed their complaint in the district court. Thus there was not, for *Younger* purposes, any ongoing state proceeding warranting abstention by the district court.

The state responds, nevertheless, that a grand jury proceeding should fall within the *Younger* rule because such a proceeding is important to the state and to some extent is subject to judicial supervision. Neither reason serves to distinguish *Hawaii Housing*. Condemnation proceedings are also important to the state, and those proceedings are subject to judicial supervision.

The state officers urge further that, even if no judicial proceedings was pending when the plaintiffs filed their complaint, there was *available* at that time a state judicial remedy by which the plaintiffs could have obtained the return of their property; they contend that the availability of such a remedy mandates district court abstention. While it may be true that such a remedy was available to the plaintiffs,<sup>7</sup> in no case has the Supreme Court or this court

<sup>6</sup> A New Jersey grand jury can also return a presentment. N.J. Crim. Prac. R. 3:6-9. A presentment is not even a charge. It affords no opportunity to adjudicate anything, even after it has been filed.

<sup>7</sup> The defendants point to the New Jersey rule that provides that

[a] person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding, may apply to the Superior Court only and in the county in which the

ever turned the propriety of a *Younger* dismissal upon the mere availability of a state judicial proceeding. Indeed, the holding of *Hawaii Housing* is directly in opposition to such an extension of *Younger*.

The state officials' final position is that a *Younger* dismissal was proper because after the plaintiffs filed their federal complaint some proceedings with respect to the property in issue occurred before the Superior Court judge who authorized the search warrant. They refer specifically to the fact that, while the state officials' motion to dismiss and the plaintiffs' cross-motion for return of the documents were pending before the district court, the Division of Criminal Justice, proceeding *ex parte*, obtained an order directing certain of the plaintiffs to show cause why certain of the seized documents that had been sealed by consent should not be unsealed. It is the appellant state officials' position that these proceedings justifying district court abstention.

The Supreme Court has held that in limited circumstances a district court should abstain from adjudicating a federal complaint if relevant state proceedings commence after the filing of the federal complaint. See *Hicks v. Miranda*, 422 U.S. 332, 348-50 (1975). However, such abstention is inappropriate in this case for two reasons. First,

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matter is pending or threatened to suppress the evidence and for the return of the property seized. . . .

N.J. Crim. Prac. R. 3:5-7. They contend that the plaintiffs could have applied to the Superior Court Judge who issued the search warrant — the judge who happens also to be the one to whom the state grand jury would return an indictment — for a return of the property. This contention raises several technical problems, not the least of which is that no penal proceeding, so far as the complaint shows, is pending or threatened against any of the plaintiffs. However, even if the rule were inapplicable, the plaintiffs could have brought an action in the Superior Court in the nature of replevin. See N.J. Stat. Ann. § 59(West 1952). Thus there is no question but that relief was (and presumably still is) available in the state court had the plaintiffs chosen to sue there.



since the trial court granted a Rule 12(b)(6) motion—which confines our review to the complaint—the post-complaint proceedings are not relevant to our review of the district court action. Second, if they were relevant, the contention would not be dispositive, except, perhaps, with respect to issues of privilege and work product tendered by the Division of Criminal Justice to the state court with respect to the sealed documents. The claim for return of property with respect to all the other seized materials would remain.

At the time the plaintiffs filed their federal complaint no state judicial proceeding in which they could have adjudicated their constitutional claim for return of the seized property was pending. We therefore hold that the district court erred in dismissing the claim on abstention grounds.<sup>8</sup>

#### IV. The Motion for the Preliminary Injunction —

The plaintiffs moved in the district court for a preliminary injunction ordering the return of the seized documents. The district court denied this motion, and the plaintiffs appeal.

Unlike our review of the dismissal of the complaint under Rule 12(b)(6), which is plenary, we review the denial of a preliminary injunction for an abuse of discretion. See *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 958 (3d Cir. 1984). In assessing the plaintiffs' motion the district court was obliged to consider whether the movants had made a strong showing of likelihood of success on the merits, whether they had shown that without the requested relief they would suffer irreparable injury, whether other parties would be harmed by the grant of the requested injunction, and whether the public interest favored such relief. *Id.* at 958-59.

<sup>8</sup> This conclusion obviates the need to address the plaintiffs' alternative contention that abstention was improper because their complaint pleaded bad faith and harassment by the state official defendants.

The plaintiffs rely principally upon assertions that they likely will prevail on the merits of their claim and that they will suffer irreparable harm. They concede, however, that any harm to their business is mitigated by the fact that, although the state officials retain possession of the records, their agents have been granted access to them. As to the likelihood of their succeeding on the merits, there are many issues, both factual and legal, that the state raises. Thus we cannot say that the district court abused its discretion in denying the plaintiffs' request for a preliminary injunction.<sup>9</sup>

#### IV.

The judgment dismissing the complaint will be reversed. The order denying the motion for a preliminary injunction will be affirmed. The case will be remanded for proceedings consistent with this opinion.

*ADAMS, Circuit Judge, concurring in part and dissenting in part.*

The principal holding of the majority is that the district court erred when it abstained under *Younger v. Harris*, 401 U.S. 37 (1971), in order to avoid interfering with an ongoing state grand jury investigation and concomitant state court proceedings regarding the propriety of a seizure of plaintiffs' documents. Although I concur with the majority that the district court erred in dismissing plaintiffs' claims for money damages, I respectfully disagree on the *Younger* issue. In my view, abstention is appropriate with regard to plaintiffs' request for an order requiring state officials to return documents obtained allegedly in violation of the fourth amendment, since a means

<sup>9</sup> That is not to say that the plaintiffs' federal case should be left in perpetual limbo. Our affirmance of the denial of a preliminary injunction is without prejudice to its renewal should the state official defendants retain possession of plaintiffs' property and should nothing further transpire before the grand jury.

exists by which that constitutional claim may be raised in the pending state court proceedings.

# I.

It is helpful to an understanding of the abstention issue in this case to recount some of the pertinent facts in the factual and procedural history of this appeal not referred to in the majority's opinion. On October 4, 1984, Judge Samuel D. Lenox, Jr. of the New Jersey Superior Court issued a warrant authorizing state police officers and investigators of the New Jersey Division of Criminal Justice to search the premises of Foundations & Structures, Inc. (F&S) for evidence of theft, bribery, and tampering with records. Judge Lenox had been assigned the responsibility of supervising a state grand jury investigating alleged corruption in the construction industry pursuant to N.J. Stat. Ann. § 2A:73A-6 (West 1976). The warrant was executed on October 5. On the same day, three state grand jury subpoenas were served on plaintiff Theodore DeSantis, requiring the production of certain records of F&S and Monaghan Associates. These incidents gave rise to plaintiffs' claim under the fourth amendment.

At the time of the search, plaintiffs protested that they had received an inadequate inventory of the documents seized. To resolve the dispute, plaintiffs and the state officials telephoned Judge Lenox, as the supervising judge who had issued the search warrant. Judge Lenox ordered that all documents in dispute be placed in sealed cartons, that were not to be opened until the adequacy of the inventory could be determined. The documents seized were then placed in the evidence vault at the Division of Criminal Justice in Trenton.

Plaintiffs filed this lawsuit under 42 U.S.C. § 1983 (1982) on December 26, 1984, claiming abridgements of their rights under the fourth, fifth, sixth, and fourteenth amendments, as well as stating several pendant claims under

state tort law. They sought a preliminary injunction requiring defendants, the state investigative authorities involved, to return all documents seized that were privileged or beyond the scope of the warrant, and a permanent injunction requiring the return of all documents. Plaintiffs also requested preliminary and permanent injunctions against future unreasonable searches and seizures, compensatory and punitive damages, and attorney fees. Defendants answered the complaint on January 28, 1985, by moving in the district court to dismiss the case under *Younger v. Harris*. Plaintiffs responded to this motion on February 15 by again requesting preliminary injunctive relief.

On February 19, 1985, while the federal court proceedings remained in the pleadings stage, defendants returned to Judge Lenox and obtained an ex parte order to show cause why the sealed documents should not be opened. Plaintiffs then moved to quash the order on the grounds that it had been improperly issued on an ex parte basis and that defendants had sought the order solely as a device to induce the federal court to abstain pursuant to *Younger*. At a hearing before Judge Lenox on the motion to quash held March 11, 1985, plaintiffs urged the state court not to interfere with their federal action by allowing the state authorities to unseal the documents.

The state court, however, asserted that when it ordered the documents sealed on October 5, 1984, it contemplated that the parties would return to it to resolve further disputes concerning the propriety of the seizure. The court also pointed out to plaintiffs that if they wished to raise a fourth amendment claim in the state proceedings, they could file a motion for return of the documents under New Jersey Court Rule 3:5-7.<sup>1</sup> Finding that the order to show

<sup>1</sup> That rule provides in pertinent part:

(a) Notice; Time. On notice to the prosecutor of the county in

cause had not been improperly issued and that it was not divested of jurisdiction by plaintiffs' filing of a federal action, the state court denied plaintiffs' motion to quash.

Meanwhile, on March 8, 1985, the federal district court heard oral argument on defendants' motion to dismiss under *Younger* and on plaintiffs' request for preliminary relief. At the close of the hearing, the district court ordered that all discovery be stayed, and that the disputed documents remain sealed pending a further decision by the district court on the *Younger* issue.

Judge Lenox held a second state court hearing on the order to show cause on March 25, 1985. At that hearing, the parties discussed the procedure to be used in determining which, if any, of the seized documents were covered by the attorney-client privilege. Plaintiffs also raised the issue whether some of the documents were subject to suppression or return because they were beyond the scope of the warrant. Judge Lenox again informed plaintiffs that if they wished to assert that certain documents had been unconstitutionally seized, they could file a motion under Rule 3:5-7. At the close of the hearing, the parties agreed to submit an order embodying the procedure for review of the documents. Judge Lenox further told the state officials that if they wished to contest any factual allegations made by plaintiffs, they could request a hearing.

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which the matter is pending or threatened, to the applicant for the warrant if the search was with a warrant, and to co-indictees, if any, and in accordance with the applicable provisions of R. 1:6-3 and R. 3:10, a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding, may apply to the Superior Court only and in the county in which the matter is pending or threatened to suppress the evidence and for the return of the property seized even though the offense charged or to be charged may be within the jurisdiction of a municipal court.

On June 26, 1985, the state officials asked for such a hearing, asserting that there were disputed factual issues relevant to the determination as to which documents were privileged. The state court responded that it would schedule a hearing if defendants identified the issues they wished to raise. But the defendants did not identify the issues allegedly in dispute, and no such hearing was ever arranged.

The state grand jury investigation of plaintiffs and their activities had been proceeding throughout this period: on February 14, 1985, the records of J.E.T. Charter Service, Inc., a subcontractor of plaintiffs, were subpoenaed; the following day, F&S's bank records were subpoenaed; and on March 8, 1985, plaintiff William Monaghan was ordered to appear at the Trenton Criminal Justice Complex to provide handwriting exemplars.

Judge Brotman, the district court judge, issued his opinion denying plaintiffs' request for a preliminary injunction and dismissing the action under *Younger* on August 6, 1985. After a timely appeal was filed, plaintiffs DeSantis and Monaghan were subpoenaed to appear at the Trenton Criminal Justice Complex, where they were informed on December 30, 1985 that they are targets of the state grand jury investigation.

## II.

In *Younger*, the Supreme Court held that, absent special circumstances, a federal court should abstain from enjoining or interfering with a pending state criminal prosecution. The holding was based upon the rationale that federal-court interference with pending state proceedings is inconsistent with the principles of federalism and comity, which reflect "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the national government will fare best



if the states and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. at 44.

The abstention doctrine has been expanded considerably over the years since *Younger* was decided. See, e.g., *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (applying abstention to state bar disciplinary proceedings); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (applying abstention in favor of a civil action by the state to recover wrongfully-obtained welfare benefits); *Juidice v. Vail*, 430 U.S. 327 (1977) (applying abstention where federal plaintiff is involved in state court contempt proceedings as judgment debtor); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (applying abstention in deference to civil nuisance action brought by county officials against theatres showing pornographic film). Most recently, the Supreme Court in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 54 U.S.L.W. 4860 (U.S. June 27, 1986), held that the federal courts must abstain from adjudicating employment discrimination claims that are pending in state administrative tribunals. "[T]he proper respect for the fundamental role of states in our federal system," *id.* at 4862, the Court held, dictates that states should not be enjoined from vindicating important interests in state judicial or administrative proceedings. *Id.* In his opinion for the Court, Justice Rehnquist emphasized that even if the administrative proceedings would not provide a forum for resolution of constitutional claims, state judicial review of any agency decision would be sufficient for protection of any constitutional interests. *Id.* at 4863.

The "strong policies counseling against the exercise of [federal] jurisdiction where particular kinds of state proceedings have already been commenced", *id.* at 4862, are also controlling in this case, where pending state criminal proceedings undeniably present the important state interests at issue in *Younger* and its progeny. The district court quite properly abstained in favor of the New Jersey state

courts in deference to the principles of federalism and comity that are central to our federal union.

In *Middlesex County Ethics Committee*, 457 U.S. 423, the Supreme Court set forth the analysis to be applied when a federal court is urged to abstain under *Younger* in deference to a state proceeding. As stated there, the appropriate inquiry is three-part: "first, do [the pending state proceedings] constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges," *Id.* at 423.

Applying the first prong of the prescribed analysis to this matter, it appears that the district court correctly ruled in its decision of August 1985 that the ongoing proceedings before Judge Lenox concerning the seized documents required it to abstain under *Younger*. At that time, the parties had appeared twice before Judge Lenox in New Jersey Superior Court and were involved in proceedings to determine which documents were subject to suppression because of the attorney-client privilege. Plaintiffs had further been invited by the state judge to raise their fourth amendment claim by way of a motion for return of the documents under N.J. Court Rule 3:5-7. Furthermore, during the hearing March 25, 1985, plaintiffs themselves attempted to raise the issue whether certain documents were seized beyond the scope of the warrant.

The majority asserts that, since the district court dismissed plaintiffs' action under Fed. R. Civ. P. 12(b)(6), state court proceedings that took place after the filing of the federal complaint are not relevant to the determination whether *Younger* abstention is appropriate. Majority Typescript at 17. However, while the district court may have described its action in disposing of the case as a dismissal of the complaint, it is plain that the court based its decision on the *Younger* doctrine. And the Supreme Court has

clearly stated that state court proceedings occurring after the filing of a federal complaint are not to be ignored in deciding questions of *Younger* abstention. See *Ohio Civil Rights Commission*, 54 U.S.L.W. at 4863 n.2 (holding that *Younger* abstention is appropriate where, as here, state proceedings were "begun before any substantial advancement in the federal action took place"); *Middlesex County Ethics Committee*, 457 U.S. at 436-37; *Hicks v. Miranda*, 422 U.S. 332, 349 (1975) ("[W]here state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court, the principles of *Younger v. Harris* should apply in full force."). In this case, as in *Middlesex County*, "[t]hus far in the federal-court litigation the sole issue has been whether abstention is appropriate." 457 U.S. at 437. It is therefore clear that this Court not only may, but must take into consideration any developments in the state court proceedings occurring subsequent to the filing of the federal complaint.

Furthermore, under the second prong of the inquiry prescribed by *Middlesex County*, the state court proceedings plainly implicate important state interests. The injunction sought by plaintiffs would require the suppression of documents obtained by the state pursuant to a facially valid search warrant for use in an ongoing criminal investigation. In *Perez v. Ledesma*, 401 U.S. 82 (1971), decided the same day as *Younger*, the Supreme Court recognized that a request that evidence to be used in a state criminal trial be suppressed by federal court order constitutes nearly as great an interference in the state proceedings as would the enjoining of the proceedings themselves. In *Perez* the evidence sought to be suppressed was to be used in an ongoing criminal prosecution. Admittedly, no such prosecution has as yet been initiated in

this case.<sup>2</sup> Nonetheless, the state's interest in the unhindered enforcement of its criminal laws has been repeatedly recognized by the Supreme Court as a state interest deserving of the greatest deference in cases posing problems under *Younger*: See, e.g., *Trainor*, 431 U.S. at 443 (*Younger* abstention is appropriate in deference to state civil proceedings to enforce laws in aid of and related to criminal statutes); *Huffman*, 420 U.S. at 604-05 (same). The state court proceedings at issue here, concerning the propriety of the seizure of documents to be used in an ongoing state grand jury proceeding and criminal investigation, implicate that interest in a very direct manner.

As to the third prong of the *Middlesex County* analysis, it appears that plaintiffs' fourth amendment claim can be raised in the pending state proceedings. Judge Lenox twice alerted plaintiffs to the possibility of filing a motion for return of the seized documents pursuant to N.J. Court Rule 3:5-7. That rule permits persons whose property has been seized pursuant to a warrant in an unlawful search and seizure to request the return of the improperly seized property. And the New Jersey courts have held that relief is available under Rule 3:5-7 not only to one who has been charged with a crime, but also to one who has reason to believe that property seized may be used as evidence against him in a penal proceeding. See, e.g., *In re C Co.*, 115 N.J. Super. 262, 279 A.2d 130, 132 (App. Div. 1971);

<sup>2</sup> Plaintiffs argue that the district court's finding that there is an ongoing state grand jury investigation was clearly erroneous. However, those state authorities responsible for conducting and supervising the investigation repeatedly represented to the district court that a grand jury was sitting and investigating alleged misconduct by plaintiffs. Furthermore, plaintiffs concede that they have been served with numerous subpoenas and that two of the plaintiffs were informed that they are targets of a grand jury investigation. Since grand jury proceedings must be conducted in secrecy, it is not clear what further evidence would be required to support a finding that such proceedings are taking place.

*State v. Fioravanti*, 78 N.J. Super. 253, 188 A.2d 308, 309-10 (App. Div. 1963). When plaintiffs may raise their fourth amendment claim in the state proceedings under rule 3:5-7, there is no valid reason for a federal court to adjudicate that claim.

The majority concludes that the availability of relief in the state court pursuant to Rule 3:5-7 does not require the federal court to abstain under *Younger*. Its apparent rationale is that, by filing a motion for the return of the seized documents, plaintiffs would not be raising their fourth amendment claim in an ongoing state court proceeding but rather would be initiating a new and distinct legal proceeding in state court.

It is true that Judge Lenox stated during the March 11, 1985 hearing that if plaintiffs filed a motion under Rule 3:5-7, the motion might be assigned to a different judge "because that motion is typically heard by a judge of the Criminal Division." App. at 485. However, at the hearing on March 25, 1985, Judge Lenox suggested that such a motion by plaintiffs would come before him as part of the pending proceedings regarding the seizure of the documents. App. at 535. In either case, a motion for the return of the documents would involve factual issues that overlap extensively with those underlying the current state court proceeding and would therefore constitute a related aspect of that proceeding. Where this is so, it can hardly be said that "state law clearly bars the interposition of the constitutional claims." *Moore*, 442 U.S. at 426. Further, in *Middlesex County* the Supreme Court found that a sufficient opportunity to raise a constitutional claim existed in state administrative disciplinary proceedings where the claim could be asserted in the state supreme court on appeal. 457 U.S. at 436. See also *Ohio Civil Rights Commission*, 54 U.S.L.W. 4860 (it is sufficient that constitutional claims may be raised in state court judicial review of an administrative proceeding). It is thus not a prerequisite to *Younger* abstention that a constitutional claim

may be raised at any particular stage in a state proceeding. Similarly, that plaintiffs' Rule 3:5-7 motion might be heard by a state judge other than Judge Lenox is insufficient reason to conclude that the state proceedings do not provide adequate opportunity to raise the constitutional claim being asserted by the plaintiffs.

Because application of the three-part inquiry outlined in *Middlesex County* leads ineluctably to the conclusion that *Younger* abstention is appropriate in this case, the district court did not err in abstaining from adjudicating plaintiffs' claim for injunctive relief unless extraordinary circumstances exist warranting that an exception be made. *Id.* at 437; *Younger*, 401 U.S. at 53-54. Although plaintiffs argue that they have been harassed and that the investigation into their alleged misconduct is in bad faith, they have provided no support for these assertions. Similarly, they cannot claim that the state is attempting to enforce against them a law that is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Watson v. Buck*, 313 U.S. 387, 402 (1941), quoted in *Younger*, 401 U.S. at 53-54; see also *Middlesex County*, 457 U.S. at 437; *Judice*, 430 U.S. at 338.

Since consideration by a federal court of plaintiffs' fourth amendment claim for injunctive relief in the context of this appeal would constitute an undue interference with New Jersey's important interest in investigating criminal conduct within its borders and in determining whether evidence to be used in that investigation was improperly obtained, I would affirm the district court's decision to abstain as to the request for injunctive relief.

## II.

The Supreme Court has stated that "the only pertinent inquiry [in a case raising an issue of *Younger* abstention]



is whether the state proceedings afford an adequate opportunity to raise the constitutional claims." *Moore*, 442 U.S. at 430. In my view, the pending proceeding in New Jersey Superior Court concerning the seizure of plaintiffs' documents provides an adequate forum for the assertion of their fourth amendment claim.

Further, the application of *Younger* abstention in this case is more than an intellectual exercise dealing with the important issues of federalism and comity. The decision whether to abstain in this matter may have considerable consequences for the state proceedings at issue. Under the result reached by the majority, the federal district court will proceed to adjudicate plaintiffs' right to the return of documents that may be crucial to the state grand jury proceeding and criminal investigation. Refusal to abstain here will create a considerable risk of federal-state friction as well as a delay in the criminal investigation. By contrast, under the approach employed by the district court, plaintiffs' fourth amendment claim would be decided in the ongoing state court proceeding along with the privilege issue, thereby eliminating federal intervention in the state investigation and avoiding duplicative litigation.

This case provides no occasion for casting aside the interwoven precepts of federalism and equitable jurisdiction that combine to make up the *Younger* doctrine of non-intervention. Accordingly, I respectfully dissent from that portion of the majority's opinion holding that the district court erred in dismissing plaintiffs' claim for injunctive relief.

A True Copy: }

Teste:

*Clerk of the United States Court of Appeals  
for the Third Circuit*

## APPENDIX E

### UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-5589

WILLIAM MONOGHAN, et al.

*Appellants,*

v.

DEAN DEAKINS, New Jersey Division of Criminal Justice,  
et al

*Appellees.*

### SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Seitz and Becker would grant appellees' petition for rehearing.

By the Court,

/s/ JOHN J. GIBBONS  
Circuit Judge

Dated: August 29, 1986

**Statement by Judge Admas  
Sur Petition for Rehearing in Banc**

I respectfully dissent from the action of the court today because I believe that the issue posed by this appeal is of sufficient importance to command the attention of the full court.

In contrast to the panel's determination that the district judge erred when he declined to interrupt a state grand jury proceeding, recent Supreme Court decisions construing the abstention doctrine have held unswervingly to the principle that federal courts must defer to ongoing state proceedings in a variety of contexts and most especially in a criminal law setting. Thus, in *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S. Ct. 2718 (1986), the Supreme Court held that federal tribunals must take into consideration any developments in state court proceedings, even when such developments occur after the filing of the federal complaint. The panel's holding — that post-complaint developments are irrelevant to the question whether to abstain — is therefore contrary to controlling precedent.

Further, and equally important, I am persuaded that the issue presented by this appeal is significant both as a matter of federal jurisprudence and as an example of the deference essential to the functioning of a federal system of government. The state court here is fully prepared to adjudicate the constitutional claims raised by the plaintiffs. To permit plaintiffs to invoke the jurisdiction of the federal court in such a situation would unduly obstruct state grand jury

A True Copy:

Teste:

*Clerk of the United States Court of Appeals  
for the Third Circuit*

## APPENDIX F

## AMENDED ORDER

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

 NO. 85-5589
 

---

WILLIAM MONAGHAN, et al.

*Appellants,*

v.

DEAN DEAKINS, New Jersey Division of Criminal Justice,  
et al*Appellees.*


---

 SUR PETITION FOR REHEARING
 

---

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN,  
*Circuit Judges*

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Seitz, Weis, and Becker would grant appellees' petition for rehearing.

By the Court,

/s/ JOHN J. GIBBONS

Judge

Dated: September 4, 1986



**Statement by Judge Adams  
Sur Petition for Rehearing in Banc**

I respectfully dissent from the action of the court today because I believe that the issue posed by this appeal is of sufficient importance to command the attention of the full court.

In contrast to the panel's determination that the district judge erred when he declined to interrupt a state grand jury proceeding, recent Supreme Court decisions constructing the abstention doctrine have held unswervingly to the principle that federal courts must defer to ongoing state proceedings in a variety of contexts and most especially in a criminal law setting. Thus, in *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S. Ct. 2718 (1986), the Supreme Court held that federal tribunals must take into consideration any developments in state court proceedings, even when such developments occur after the filing of the federal complaint. The panel's holding — that post-complaint developments are irrelevant to the question whether to abstain — is therefore contrary to controlling precedent.

Further, and equally important, I am persuaded that the issue presented by this appeal is significant both as a matter of federal jurisprudence and as an example of the deference essential to the functioning of a federal system of government. The state court here is fully prepared to adjudicate the constitutional claims raised by the plaintiffs. To permit plaintiffs to invoke the jurisdiction of the federal court in such a situation would unduly obstruct state grand jury proceedings and in some cases abort them.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals  
for the Third Circuit*

**APPENDIX G**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

**NO. 85-5589**

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES,  
FOUNDATIONS AND STRUCTURERS, INC. WILLIAM E.  
MONAGHAN ASSOCIATES, and MJD CONSTRUCTION COMPANY,  
INC.,

*Appellants*

vs.

DEAN DEAKINS, New Jersey Division of Criminal Justice,  
etc.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until **December 3, 1986**.

/s/ JOHN J. GIBBONS

Circuit Judge

Dated: September 23, 1986

# **OPPOSITION BRIEF**

JAN 2 1987

JOSE SPANOL, JR.  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

DEAN DEAKINS, New Jersey Division of Criminal Justice; IRVING DUBOW, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; RONALD LEHMAN, NEW JERSEY STATE POLICE; ALBERT G. PALENTCHAR, New Jersey Division of Criminal Justice; DONALD A. PANFILE, New Jersey Department of Treasury; WALTER PRICE, New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundations & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice,

*Petitioners,*

vs.

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES, FOUNDATIONS & STRUTURES, INC., WILLIAM E. MONAGHAN ASSOCIATES, AND MJD CONSTRUCTION COMPANY, INC.,

*Respondents.*

## On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

### RESPONDENTS' BRIEF IN OPPOSITION

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*Of Counsel and  
on the Brief*



(i)

QUESTIONS PRESENTED FOR REVIEW

1. Does the pendency of a state grand jury investigation require the federal court to abstain under Younger v. Harris from exercising jurisdiction over an action brought under 42 U.S.C. sec. 1983 for money damages and injunctive relief where plaintiffs allege violations of federal constitutional rights during, and in connection with, the execution of a state grand jury search warrant?

2. Did the Court of Appeals for the Third Circuit err in directing the Federal District Court to follow Third Circuit precedents which require a stay, rather than dismissal, of an action brought under 42 U.S.C. sec. 1983 and otherwise subject to dismissal under Younger v. Harris, when the relief sought in the action includes damages as well as equitable relief?

(ii)

PARTIES TO THE PROCEEDINGS

Petitioners were sued below as individuals acting under color of state law. At the time of the events complained of, petitioners Deakins, DuBow, Gray, Palentchar, Price, Southwick and Sost were employed by the State of New Jersey, Division of Criminal Justice. Petitioner Lehman was an employee or agent of the New Jersey State Police; petitioner Panfile was an employee or agent of the New Jersey Department of Treasury. The three John Doe petitioners were identified by the complaint below as, respectively, an individual coordinating a search of the premises of respondent Foundations & Structures, Inc., an individual supervising investigators in the New Jersey Division of Criminal Justice, and an individual

(iii)

training investigators in the New Jersey Division of Criminal Justice.

Respondents are William Monaghan, Theodore DeSantis, John James, Foundations & Structures, Inc., William E. Monaghan Associates and MJD Construction Company, Inc.<sup>1</sup>

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<sup>1</sup> Pursuant to Rule 28.1, petitioners state that Foundations & Structures, Inc. and M.J.D. Construction Company, Inc. are affiliated companies. Neither has any subsidiaries or other affiliated companies.

(iv)

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NO. 86-890

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

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DEAN DEAKINS, New Jersey Division of  
Criminal Justice; IRVING DUBOW, New Jersey  
Division of Criminal Justice; ROBERT GRAY,  
New Jersey Division of Criminal Justice;  
RONALD LEHMAN, New Jersey State Police;  
ALBERT G. PALENTCHAR, New Jersey Division  
of Criminal Justice; DONALD A. PANFILE, New  
Jersey Department of Treasury; WALTER  
PRICE, New Jersey Division of Criminal  
Justice; WILLIAM SOUTHWICK, New Jersey  
Division of Criminal Justice; RONALD SOST,  
New Jersey Division of Criminal Justice;  
JOHN DOE, an individual coordinating a  
search of the premises of Foundation &  
Structures, Inc.; JOHN DOE, an individual  
supervising investigators in the New Jersey  
Division of Criminal Justice; and JOHN DOE,  
an individual training investigators in the  
New Jersey Division of Criminal Justice,  
Petitioners,

vs.

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN  
JAMES, FOUNDATIONS & STRUCTURES, INC.,  
WILLIAM E. MONAGHAN ASSOCIATES, AND MJD  
CONSTRUCTION COMPANY, INC.,  
Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT

---



RESPONDENTS' BRIEF IN OPPOSITION

---

The respondents William Monaghan, Theodore DeSantis, John James, Foundations & Structures, Inc., William E. Monaghan Associates, and MJD Construction, Inc. respectfully oppose the application to have a Writ of Certiorari issued to review the order of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on July 31, 1986.

JURISDICTION

Respondents' complaint, filed in the United States District Court for the District of New Jersey, invoked federal jurisdiction under 28 U.S.C. sec. 1331, 28 U.S.C. sec. 1343 and principles of pendent jurisdiction. Respondents otherwise rely on the jurisdictional statement contained in the "Petition For A Writ Of Certiorari

To The United States Court Of Appeals For The Third Circuit," hereafter "Petition."

STATEMENT OF THE CASE-

In an opinion filed July 31, 1986, the United States Court of Appeals for the Third Circuit unanimously held that the district court had ignored Third Circuit precedents which required the federal district court, when abstaining under Younger v. Harris from adjudicating claims for injunctive relief, to stay and not dismiss claims for damages and attorneys fees when these remedies were not available in the pending state proceeding requiring abstention. (Petitioners' Appendix 25a, hereafter "Pet. App.")

The Third Circuit further held that the district court had erred in abstaining under Younger v. Harris because the state grand jury proceeding at issue did not provide an adequate forum for respondents'

federal claims. (Pet. App. 29a-30a). The Third Circuit therefore reinstated respondents' limited claims for equitable relief as well. The Honorable Arlin M. Adams, U.S.C.J., concurred in the holding that the district court erred in dismissing respondents' claims for damages but dissented insofar as the reinstatement extended to respondents' claims for equitable relief. (Pet. App. 33a-44a).

The complaint under consideration by the Third Circuit was filed on December 26, 1984. Respondents alleged that petitioners, as individuals but under color of state law, violated rights guaranteed to respondents under the United States Constitution and under the common laws of the State of New Jersey in connection with the execution of a state grand jury search warrant on the premises of respondent

Foundations & Structures, Inc. on October 5, 1984.

Respondents alleged in their complaint that those petitioners who executed the warrant occupied the premises for nearly eight hours, illegally barricading the entrance to the site with a state vehicle, searching exiting vehicles, recording serial numbers of construction machinery on the site and taking photographs. The complaint alleged that petitioners used the company telephone without authorization and denied such use to others, and required everyone on the multi-acre site--including non-employees--to line up and produce identification. Respondents also alleged that hundreds of documents that were facially outside the scope of the warrant or were protected by attorney-client or work product privileges were indiscriminately seized, including

documents in a folder plainly marked "Grand Jury." (Respondents' Appendix A, hereafter "Resp. App.").

None of respondents had been informed at the time the warrant was executed or at the time of the filing of the complaint that they were targets of the state grand jury investigation giving rise to the warrant. Indeed, respondents alleged in their complaint that the warrant was executed in furtherance of an unlawful attempt to coerce respondents into cooperating with state authorities in the investigation of others. (Resp. App. A). Respondents further alleged deprivation of liberty and interference with the right to counsel and to be free from coerced self-incrimination. In addition to these federal causes of action, respondents asserted four causes of action arising under state law, sounding in trespass,

conversion, unlawful confinement, and intentional infliction of emotional distress. (Resp. App. A).

Respondents sought compensatory and punitive damages, limited injunctive relief, and costs and attorneys fees pursuant to 42 U.S.C. sec. 1983 and the common laws of the State of New Jersey. Respondents did not seek to enjoin any proceeding or prosecution and did not move for preliminary injunctive relief at the time of the filing of the complaint.

Petitioners moved to dismiss the complaint on or about January 28, 1985, contending, inter alia, that the district court should refrain from exercising jurisdiction under the principles of equitable abstention set forth in Younger v. Harris, 401 U.S. 37 (1971). On or about February 15, 1985, respondents filed papers in opposition to the motion to dismiss and



cross-moved for preliminary relief in the form of return of certain of the documents seized by petitioners on October 5, 1984.<sup>2</sup>

On February 19, 1985, four days after respondents filed their cross-motion in federal court for return of documents, the State of New Jersey, Division of Criminal Justice, obtained an order signed by the Honorable Samuel D. Lenox, Jr., Assignment Judge of the Superior Court of New Jersey, Mercer County, requiring certain of the respondents to show cause why certain of the documents seized on October 5, 1984 and later sealed by consent of counsel should not be unsealed. These documents constituted a subset of the documents which were the subject of respondents' cross-motion in federal court.

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<sup>2</sup> Petitioners imply that respondents had previously moved for injunctive relief. See Petition, p.6. The record clearly shows that this suggestion is inaccurate.

The Order to Show Cause was obtained from the state court ex parte and without notice to respondents' counsel. Papers filed in support of the Order to Show Cause did not inform the state court of respondents' pending motion before the federal court which encompassed the very same documents. The subsequent appearances of counsel before Judge Lenox in connection with the Order to Show Cause focused exclusively on the narrow issue of the applicability of the attorney-client privilege to the subset of documents that had been sealed by consent of counsel. During an appearance by counsel on March 11, 1985, Judge Lenox informed respondents' counsel that any relief by way of return of documents would have to be obtained by filing a separate motion under New Jersey Court Rule 3:5-7(a) which might not even have been heard by him. (Resp. App. D).

Judge Lenox denied respondents' motion to quash the Order to Show Cause on March 11, 1986 and on March 25, 1985, ordered further submissions and affidavits on the issue of the applicability of the asserted privileges. Having successfully defended the ex parte Order to Show Cause in state court, petitioners relied heavily on that Order in arguing before the federal district court that abstention was required.

On March 8, 1985, the Honorable Stanley S. Brotman, U.S.D.J., heard oral argument on petitioners' motion to dismiss and on respondents' cross-motion. Judge Brotman reserved decision, ordering a stay of all discovery and ordering the sealing of the disputed documents pending determination of the motions by the Court. An order to this effect was entered on March 25, 1985. (Pet. App. A).

Subsequently, the State of New Jersey allowed its application before Judge Lenox to languish. On or about June 28, 1985, Judge Lenox requested the State of New Jersey to comply with orders of the state court by specifying factual assertions in the submitted affidavits to be the subject of a hearing. (Resp. App. B). The State of New Jersey took absolutely no action in response to this letter for over 10 months. Finally, on or about May 12, 1986, Judge Lenox notified all parties that he considered the State's motion withdrawn. (Resp. App. C).

On August 6, 1985, the federal district court dismissed respondents' federal action under Younger v. Harris. The district court further held that respondents had not met the requirements for issuance of a preliminary injunction. (Pet. App. C).

Respondents filed a timely Notice of Appeal on September 4, 1985. On December 30, 1985, over four months after dismissal of the federal complaint, two of the six respondents, William E. Monaghan and Theodore DeSantis, were informed that they were targets of a state grand jury investigation.

On July 31, 1986, a unanimous United States Court of Appeals for the Third Circuit, reversing the federal district court, held that under controlling Third Circuit precedent, the district court plainly erred in not entering a stay and retaining jurisdiction over respondents' claims for money damages and attorneys fees. (Pet. App. 25a). The unanimous circuit court also affirmed the denial of preliminary relief (Pet. App. 32a-33a). A majority of the Third Circuit panel further held that abstention was improper because

no state proceeding was ongoing which could adjudicate the merits of respondents' federal claims and because no indictments had been returned against respondents at the time that they filed their complaint in the federal court. (Pet. App. 29a-30a). The Honorable Arlin M. Adams, U.S.C.J., dissented from this part of the decision in a separate opinion.

On August 14, 1986, petitioners sought en banc rehearing. A majority of the active judges of the Third Circuit denied the petition in an order filed August 29, 1986 and again in an amended substitute order filed September 4, 1986. (Pet. App. E & F, respectively). Judge Adams again dissented from these orders in separate statements.

On September 10, 1986, over one year after the complaint had been dismissed, respondents William E. Monaghan, Theodore



DeSantis and Foundations & Structures, Inc. were indicted by a state grand jury. As of the date of this brief, three of the respondents, John James, William E.

Monaghan Associates, and MJD Construction Company, Inc., not only have not been indicted, they have not even been informed that they are targets of any continuing investigation.<sup>3</sup>

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<sup>3</sup> Petitioners continually identify respondents as "targets of a state grand jury proceeding." This characterization is factually inaccurate with respect to all respondents when the Complaint was dismissed and remains inaccurate with respect to respondents John James, William E. Monaghan Associates and MJD Construction Company, Inc. Moreover, all respondents alleged in the complaint that prosecutorial activities were being directed against them in an effort to intimidate respondents into cooperating in an investigation of others.

REASONS FOR DENYING THE WRIT

I. NEITHER THE DECISION NOR THE RECORD BELOW RAISES THE QUESTIONS PRESENTED IN THE PETITION.

Petitioners present two questions for review: (1) whether federal courts are barred from dismissing a claim for damages when they abstain from adjudicating claims for equitable relief in a suit brought under 42 U.S.C. sec. 1983; and (2) whether federal courts "must intrude" into an ongoing state grand jury investigation by virtue of a 42 U.S.C. Sec. 1983 action filed by targets of that investigation, when the federal court plaintiffs may seek redress from the State court which supervised the grand jury and issued the warrant. Neither the decision of the Circuit Court of Appeals for the Third Circuit nor the record below, fairly read,

present these questions, and the petition for certiorari must therefore be denied.

- A. The Third Circuit Properly Required The Federal District Court To Follow Controlling Third Circuit Precedents And To Retain Jurisdiction Over Claims For Damages and Attorneys Fees.

The Third Circuit unanimously held that the district court "plainly erred" in dismissing respondents' claim for money damages and attorneys fees rather than staying the federal case pending the outcome of proceedings at the state level. (Pet. App. 25a, 33a, Adams, U.S.C.J., concurring in this part of the decision). This determination was based on cases in the Third Circuit which hold that the federal district court should retain jurisdiction over claims for damages and attorneys fees when these remedies are not available in an ongoing state proceeding even when the pendency of that proceeding

requires the district court to abstain from adjudicating claims for injunctive relief. Crane v. Fauver, 762 F.2d 325, 328-29 (3d Cir. 1985); Williams v. Red Bank Board of Education, 662 F.2d 1008, 1022-24 (3d Cir. 1981). Because respondents' claims for damages and attorneys fees could not have been considered in the pending state proceedings petitioners relied on, the circuit court held that the district court erred by dismissing those claims.

Petitioners offer as a question for review a much broader question than that actually determined by the Third Circuit. The circuit court did not hold that federal courts are barred from dismissing damage claims in all cases when they abstain from adjudicating claims for equitable relief under 42 U.S.C. sec. 1983. Rather, the circuit court's decision was limited to the proper treatment of damage claims and

claims for attorneys fees when those claims cannot be heard in the ongoing state proceeding which counsels abstention. The prior decisions of Williams v. Red Bank Board of Education and Crane v. Fauver established the parameters of what constituted proper treatment of such claims within the Third Circuit and the district court was unanimously reversed for failing to observe those parameters. The actual holding of the circuit court in this portion of the opinion simply reaffirms basic principles of stare decisis and is hardly worthy of the Court's certiorari jurisdiction.

Even if the question presented by petitioners could be read to challenge the rule established within the Third Circuit by the Williams and Crane v. Fauver cases, certiorari would not be appropriate.

First, the Third Circuit rule on this issue, although solidly grounded in applicable law, has limited impact. It affects only those rare Section 1983 cases where an ongoing state proceeding is involved but the relief sought includes damages as well as injunctive relief and out of those cases, only those within the Third Circuit. No conflict arising with the decisions of any other circuit court appears to be involved.

Second, the Third Circuit rule is a logical extension of the policies governing Younger abstention. An adequate forum in the ongoing state proceeding for the plaintiffs' federal claims is required in order for Younger abstention to be appropriate. See, e.g., Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 237 (1984); Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975). Williams v. Red Bank Board of



Education and its progeny in the Third Circuit adapt this basic principle to preserve federal claims for damages and attorneys fees which are unable to be adjudicated in the state proceeding which requires abstention. Refusing to dismiss mitigates some of the practical difficulties which a dismissal creates, such as the possible running of the statute of limitations.<sup>4</sup> See Williams v. Red Bank

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<sup>4</sup> The facts of this case demonstrate the importance of preserving access to the federal forum where there are allegations of a bad faith prosecution and the defendants in the damages action can control the length of time that the state proceedings will take. The relevant period of limitations in this case is two years. See N.J.S.A. 2A:14-2: Wilson v. Garcia, 471 U.S. 261 (1985). Most of the events giving rise to respondents' causes of action occurred on October 5, 1984; formal proceedings against respondents' Monaghan, DeSantis and Foundations & Structures, Inc. were not even initiated until September 10, 1986, when the statutory period would almost have run had the complaint not been filed on or about December 26, 1984. Without a stay, the federal claims of all respondents, including those who were never  
(footnote continued)

Board of Education, 662 F.2d at 1023-24 & n.16. At the same time, as the Third Circuit pointed out in the Williams case, the mechanism of a stay accommodates the State's interest in allowing its own proceedings to go forward unimpeded, thus furthering the underlying purposes of Younger abstention. Id. at 1024. The result thus achieved is consistent with, and a logical extension of, Supreme Court precedents. Indeed, Williams v. Red Bank Board of Education recently was cited with general approval by this Court. See Ohio Civil Rights Commission v. Dayton Christian

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(footnote continued from previous page)  
indicted or even told they were targets, could be simply snuffed out by the State of New Jersey--which employs all of the defendants below--by simple lack of diligence in pursuing its investigation. Consider, for example, how the State of New Jersey allowed the proceedings before Judge Lenox to lapse once the abstention argument had been made before the federal district court.

Schools, Inc., 477 U.S. \_\_\_\_\_, 91 L.Ed.2d 512, 522 n.2, 106 S.Ct. 2718 (1986).

Petitioners argue, however, that the state courts of New Jersey can award damages and attorneys fees in suits brought under 42 U.S.C. sec. 1983. It has long been settled, however, with respect to Section 1983 actions that: "[t]he federal remedy is supplementary to the state remedy ..." Monroe v. Pape, 365 U.S. 167, 183 (1961). Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100 (1981), relied upon by petitioners, is wholly inapposite. That case held that an action for damages under 42 U.S.C. sec. 1983 could not be brought to challenge the allegedly unconstitutional administration of a state tax system. The Court expressly limited its holding to the unique area of state taxpayer suits. Id. at 105.

Petitioners' further arguments, that respondents' state law claims may only be adjudicated in state court by virtue of the doctrine of Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984)<sup>5</sup> and that a stay rather than dismissal may still interfere with the state court proceeding, touch on discretionary factors which may have influenced the district court in dismissing the complaint in its entirety. As the Third Circuit opinion makes clear, however, the precedents controlling the decision at the district level do not make the decision to dismiss or stay discretionary but require a stay under the circumstances of this case. Petitioners' arguments therefore miss the point.

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<sup>5</sup> The Third Circuit rejected petitioners' arguments under Pennhurst State School & Hospital v. Halderman as being totally unsupported by any authority or credible argument. (Pet. App. 26a).

Thus, petitioners' question for review on this issue ignores the limited nature of the circuit court's holding and the fundamental principles of stare decisis. Further, any unarticulated challenge to the circuit rule which was reaffirmed in this case is totally without merit and not of sufficient national impact to require the attention of the Court pursuant to its certiorari jurisdiction. The petition for certiorari must therefore be denied.

B. The Third Circuit Correctly Held That The Ongoing State Proceeding Did Not Provide An Adequate Forum For Respondents' Federal Claims.

Contrary to what is suggested by petitioners' first question presented for review, the Third Circuit did not require the federal court to ignore Younger abstention precepts and to intrude into an ongoing state grand jury investigation "where the federal complainants may seek

redress from the state court which supervised the grand jury and issued the warrant." The Third Circuit reversed the district court's decision to abstain precisely because what it called the "critical factor" in the abstention analysis was missing, that is, "the availability in the pending state proceeding of an adequate opportunity to adjudicate the constitutional claims raised in the federal litigation." (Pet. App. 29a), emphasis added. Petitioners gloss over the precise ruling of the court by referring very vaguely to the availability of "redress from the state court" and therefore suggest for review a question that was never determined below.

A long line of Supreme Court cases requires the adequate forum for the plaintiff's federal claims to be provided by the ongoing state proceeding which



otherwise counsels abstention. A forum provided by a separate state proceeding is not sufficient. See Ohio Civil Rights Comm'n v. Dayton Christian Schools, 91 L.Ed.2d at 522 (State administrative proceedings implicating important state interests can give rise to abstention so long as federal plaintiff will have full and fair opportunity to litigate constitutional claims "in the course of those proceedings"); Hawaii Housing Authority v. Midkiff, 467 U.S. at 237 (Comity and federalism counsel abstention whenever federal claims have been or could have presented in state judicial proceeding implicating important state interest); Middlesex Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 432 (1982) (Pertinent inquiry is whether state proceeding giving rise to abstention affords adequate opportunity to raise the

constitutional claims, quoting Moore v. Sims, 442 U.S. 415, 430 (1979)); Gerstein v. Pugh, 420 U.S. at 108 n.9 (Federal claim not barred by Younger v. Harris where it could not be raised as defense in criminal prosecution); Ohio Bureau of Employment Services v. Hodory, 431 U.S. 477, 477 (1970) (Younger abstention concerned with considerations of comity and federation as they relate to State's interest in pursuing ongoing state proceeding and as they involve ability of state courts to consider federal constitutional claims in that context), emphasis added. That the required state forum for adjudicating federal claims must be provided by the same ongoing proceeding otherwise warranting abstention is also indirectly supported by the longstanding principle that generally "available" state remedies need not be exhausted before the federal forum is open, -

e.g., Monroe v. Pape, 365 U.S. 167, 183 (1961).

At the core of the Third Circuit's opinion was the limited role of the state grand jury to which the federal court was being asked to defer. The Third Circuit pointed out that under the state law, the state grand jury is primarily accusatory in function; it can do no more than issue a charge that a defendant has violated the criminal law. (Pet. App. 30a). Therefore, under Hawaii Housing Authority and Middlesex County Ethics Committee, the Third Circuit found that the state grand jury investigation at issue in this case could not qualify as a proceeding warranting abstention because the grand jury did not function in an adjudicatory role and because, at the time of the filing of the complaint, there had been no formal

charge to initiate any judicial proceeding. (Pet. App. 29c-30a).<sup>6</sup>

This reasoning and result are clearly correct. Under New Jersey state law, a grand jury proceeding is not a "judicial proceeding" because it makes no binding determinations of law and fact. See Rosetty v. Hamilton Township Committee, 82 N.J. Super. 340, 348-49 (Law Div. 1964), affirmed per curiam, 96 N.J. Super. 66 (App. Div. 1967).

Hawaii Housing Authority v. Midkiff demonstrates that Younger abstention is not required when state judicial proceedings have not been initiated at the time when proceedings of substance take place in federal court. See 467 U.S. at 238-239. By the time appellees in Hawaii Housing

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<sup>6</sup> Cf. Steffel v. Thompson, 415 U.S. 452 (1974) (Abstention not appropriate where prosecution is merely threatened, not pending).

Authority filed suit in federal district court, the Hawaii Housing Authority had held a public hearing concerning the proposed acquisition of some of the appellees' property, had found that acquisition of those lands would effectuate the public purposes of the Hawaii Land Reform Act, had directed appellees to negotiate a price for the sale of the designated properties with existing lessees and, when those negotiations were unsuccessful, had ordered appellees to submit to compulsory arbitration. 467 U.S. at 234.

In a unanimous opinion by all those Justices participating in the decision,<sup>7</sup> the Court held that the decision not to abstain had been properly made. The Court stated that:

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<sup>7</sup> Justice Marshall did not participate in the decision.

Under Younger-abstention doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests.

Id. at 237-38, emphasis added. The Court held that in the case before it, "state judicial proceedings had not been initiated at the time proceedings of substance took place in federal court." Id. at 238, emphasis added.<sup>8</sup>

The Court further held that the extensive administrative proceedings which had taken place did not satisfy the requirement of a state judicial proceeding

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<sup>8</sup> Although not part of the circuit court's discussions, proceedings of substance had already taken place in the federal court as early as March 25, 1985 when the district court entered an order prohibiting the State of New Jersey from reviewing documents which were the subject of respondents' cross-motion in the federal court. (Pet. App. A). That Order was in effect until August 6, 1985. (Pet. App. B).



because the administrative proceedings were not part of, and were not themselves, a judicial proceeding. Id. at 238.<sup>9</sup>

The adjudicatory nature of the ongoing state proceeding was equally important in Middlesex Ethics Committee v. Garden State Bar Association, 457 U.S. at 433. The Supreme Court noted that the attorney disciplinary proceedings at issue in that case were initiated by the filing of a complaint and found that the New Jersey Supreme Court considered those proceedings to be "judicial in nature," id., quoting Toft v. Ketchum, 18 N.J. 280, 284, 113 A.2d 671, cert. denied, 350 U.S. 887 (1955).

Contrary to petitioners' arguments, Ohio Civil Rights Comm'n v. Dayton

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<sup>9</sup> The Court based this conclusion on a provision in the Land Reform Act which stated that the mandatory arbitration proceeding would be in advance of and would not constitute any part of, a condemnation or eminent domain action.

Christian Schools does not undercut the principles of Hawaii Housing Authority and Middlesex County Ethics Committee. Ohio Civil Rights Comm'n reiterates the principle that abstention is applicable to state administrative proceedings "in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." 91 L.Ed. 2d at 522, emphasis added. The administrative proceeding at issue in Ohio Civil Rights Comm'n was a state division of civil rights hearing which had commenced by way of the filing of formal complaint against the appellee private school after a finding of probable cause. The proceeding was clearly adjudicative in nature and no extended discussion of this issue was necessary. Moreover, in light of the

Court's requirement that a forum for the appellee's constitutional claims be provided in the course of the administrative proceeding and its conclusion that the proceeding at issue met that standard, the Court's further statement that judicial review of the administrative proceeding was "in any event" sufficient to provide a forum, 91 L.Ed.2d at 523, must be read as obiter dictum. In a footnote, the Court reaffirmed the Hawaii Housing Authority determination that administrative proceedings that are not judicial in nature under state law do not give rise to abstention. 91 L.Ed.2d at 522 n.2.

Even if Ohio Civil Rights Comm'n could be read to hold that a forum for the federal claims exists as long as those claims may be raised in a judicial review of the state proceeding, neither logic nor

the facts in this specific case support the conclusion that a "review" of the state grand jury proceedings through a criminal prosecution provides an adequate forum for respondents' federal claims. First, a criminal trial is in no sense a "review" of the grand jury proceeding; it is a wholly separate inquiry to determine guilt or innocence. See In re Neff, 206 F.2d 149, 152 (3d Cir. 1953); Rosetty v. Hamilton Township Committee, 82 N.J. Super. at 348-49.

Second, even putting aside the question of remedies, a criminal trial cannot provide judicial review of all of the federal claims of the respondents in this case. For example, respondents' claims of unlawful coercion and deprivation of liberty stand independently of any claims which may be raised by way of defense. See Middlesex Ethics Committee,

457 U.S. at 437 (State forum must be available for "all relevant issues"); Gerstein v. Pugh, 420 U.S. at 108 n.9 (Abstention not appropriate where claim relating to pretrial detention may not be raised as a defense at trial). Moreover, three of the respondents have not been indicted at all and the indictments of respondents Monaghan, DeSantis and Foundations & Structures, Inc. may yet be dismissed.

Potomac Electric Power Company v. Sachs, et als., 802 F.2d 1157 (4th Cir. 1986), upon which petitioners rely is factually distinguishable. The only federal claim in that case was PEPCO's claim that the federal Toxic Substances Control Act preempted Maryland's laws and regulations concerning the disposal of hazardous wastes. The Fourth Circuit held that this claim could be raised as a

defense if PEPCO were indicted by the state grand jury. Moreover, the opinion does not consider the general adequacy of a criminal prosecution as a "review" of grand jury action and does not analyze the function of the state grand jury under Maryland law.<sup>10</sup>

The clear holding of the Third Circuit was that the state grand jury investigation was not adjudicative in nature under New Jersey law and that it therefore could not, in the pre-indictment stage, provide an adequate forum for the consideration of respondents' federal claims. Accord, Brennick v. Hynes, 471 F. Supp. 863 (D.N.Y.

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<sup>10</sup> The PEPCO court also relied heavily on a prior Fourth Circuit decision, Craig v. Barney, 678 F.2d 1200 (4th Cir.), cert. denied, 459 U.S. 860 (1982). Craig v. Barney, like Kaylor v. Fields, 661 F.2d 1177 (8th Cir. 1981) and Notey v. Hynes, 418 F. Supp. 1320 (E.D.N.Y. 1976), also cited by petitioners, was decided prior to Middlesex County Ethics Committee and Hawaii Housing Authority and contains no substantive discussion of the relevant issues.



1979). In reaching this determination, the circuit court correctly relied on Hawaii Housing Authority and Middlesex County Ethics Committee.

The circuit court also correctly rejected petitioners' vague reliance upon N.J.Ct.R. 3:5-7(a) and the ex parte Order to Show Cause which petitioners obtained from Judge Lenox. N.J.Ct.R. 3:5-7(a) is strictly limited to providing a mechanism for a return of documents unlawfully seized. Moreover, that rule, as the Third Circuit correctly determined and as petitioners attempt to obscure in their petition, is a general rule of criminal procedure, outside of and independent of, the state grand jury proceeding which was the purported basis for abstention. (Pet. App. 30a-31a). Even putting aside

questions of standing<sup>11</sup> and the limited nature of the relief available, the Third Circuit correctly held that the mere availability of this independent remedy does not counsel abstention. Monroe v. Pape, 365 U.S. at 183. Petitioners have ignored the context of the circuit court's discussion in accusing the Third Circuit of writing "new law" which conflicts with Supreme Court precedents. (Pet. at 10).

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<sup>11</sup> R. 3:5-7(a) allows an application for return of documents to be made only by "a person aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence may be used against him in a penal proceeding," Pet. at pp.3-4, emphasis added. At the time the complaint was dismissed, respondents had not even been informed that they were targets of the state grand jury investigation and in fact alleged that the documents had been seized as part of a general pattern of unlawful coercion and intimidation. Three of the respondents, even at this date, have no basis to believe that any of the documents will be used against them in a penal proceeding. Under these circumstances, the Third Circuit's reservations concerning the availability of the R. 3:5-7(a) procedure were well founded.

The appearance of counsel before Judge Lenox on three occasions in connection with the Order to Show Cause was even more limited in scope than an application under R. 3:5-7. The only issue before Judge Lenox was the applicability of the attorney-client and work product privileges to the small subset of documents that were the subject of the Order to Show Cause. The Third Circuit correctly held these proceedings, instituted ex parte by the State of New Jersey, were not relevant to the full scope of respondents' claims. (Pet. App. 31a-32a).

Petitioners also suggest that certiorari is appropriate because the circuit court "has held abstention inappropriate when a state judiciary is immediately available and has explicitly expressed its willingness to adjudicate the complainant's federal claims" and that this

decision is likely to confuse the development of this area of the law." (Pet. at 10), emphasis added.

As has already been demonstrated, this was not the holding of the Third Circuit. Moreover, this argument rests on a complete distortion of the record not only as to the scope of the claims before Judge Lenox but as to the "expressed willingness" referred to above and elsewhere in the petition, e.g., Pet. at 9, 13, 18-19. Far from expressing willingness to adjudicate respondents' federal claims, Judge Lenox expressly declined to hear any issues other than those relating to attorney-client and/or work product privileges. (Resp. App. D).

It is clear therefore that the factual premise for petitioners' first Question Presented For Review is missing, that is, respondents had no redress for their claims

in the pending state proceeding allegedly warranting abstention and the Third Circuit so held. Certiorari of this question should therefore be denied. Smith v. Butler, 366 U.S. 161 (1961):

II. THE QUESTION PRESENTED FOR REVIEW IS NOW MOOT IN LIGHT OF THE RETURN OF AN INDICTMENT BY THE STATE GRAND JURY

As the Third Circuit aptly stated, the issue underlying respondents' request for equitable relief is "whether the Younger doctrine requires a district court to abstain in a case in which the federal plaintiff is a target of an ongoing New Jersey state grand jury investigation." (Pet. App. 26a-27a). It is this question which forms the basis of the petitioners' application for the issuance of a writ of certiorari from this Court.

But the question presented for review is no longer germane to this case. As the

petitioners have dutifully reported to this Court, a state grand jury indicted respondents Monaghan, DeSantis, and Foundations & Structures, Inc. on September 10, 1986, six days after the Third Circuit denied the petition for rehearing en banc. The grand jury did not, however, include respondents James, William J. Monaghan Associates and MJD Construction Company, Inc. in this indictment. It is apparent that the grand jury has concluded its investigation in this matter. The State's argument that the Third Circuit's decision will interfere with an ongoing grand jury proceeding is therefore moot.

With regard to the three indicted respondents, neither the district court nor the Third Circuit has had the opportunity to consider the changed circumstances brought about by the recent indictment. Neither of these courts has ruled on



whether the return of this state grand jury indictment would, at this point, require federal court abstention under the Younger doctrine. Upon remand from the Third Circuit, the district court would have to address this subsequent development. The district court should be given this opportunity, especially since there is no longer any ongoing grand jury proceeding which the Third Circuit's ruling could even arguably impair. The question presented for review is limited to the grand jury proceeding.

As to the other three respondents-- James, William E. Monaghan Associates, and MJD Construction Company, Inc.--the record in this case is absolutely devoid of even the slightest hint that they were ever targeted in the grand jury investigation. Petitioners have never contended that these respondents were targets of the grand

jury's probe, and they have not been indicted. Given the apparent conclusion of the grand jury's investigation, the Third Circuit's decision in favor of these respondents can in no way be said to have any impact whatever on the state grand jury process.<sup>12</sup> As to these respondents, then,

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<sup>12</sup> Indeed, the concerns expressed by petitioners and the amici curiae herein regarding the impact which the Third Circuit decision could have on the state grand jury process would appear to be greatly overblown. In the fifteen years since Younger v. Harris was handed down by this Court, only a handful of courts have been called upon to address abstention issues in the context of a state grand jury investigation. See in addition to the cases discussed at pp.36-38 and n.10 supra, Sovereign News Co. v. Falke, 448 F. Supp. 306 (N.D. Ohio), remanded for reconsideration in light of intervening state law, 610 F.2d 428 (6th Cir.), cert. denied, 447 U.S. 923 (1980). This relative infrequency dispels the notion that the Third Circuit's decision could cause widespread disruption in state law enforcement activities. At the same time, the rarity of the issue demonstrates its relative lack of importance within the federal system. In all other respects, the brief filed by amici curiae simply restates the mischaracterizations of petitioners

the question presented for review is, and always has been, factually inapposite.<sup>13</sup>

In light of the mootness of the question which the petitioners have presented for review, the grant of a writ of certiorari would be both improvident and unnecessary. Vitek v. Jones, 436 U.S. 407 (1978); Monrosa v. Carbon Black, Inc., 359 U.S. 180, 183 (1959). Respondents Monaghan, DeSantis and Foundation & Structures, Inc., respectfully request that

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(footnote continued from previous page) which have been fully addressed herein. The amici curiae brief is particularly notable, however, by its failure to distinguish actual prosecution with threatened prosecution. See Steffel v. Thompson, 415 U.S. 452 (1974). Finally, since the questions presented for review in this case are moot, the amici curiae are essentially seeking an advisory opinion of this Court.

<sup>13</sup> Similarly, in Potomac Electric Power Company v. Sachs, *supra*, the petitioners have filed a supplemental brief with this Court, informing it that the State of Maryland has recently notified them that they are no longer the subject of an ongoing Grand Jury investigation.

this Court deny the writ of certiorari and allow the matter to be remanded to the District Court for further proceedings in light of the state grand jury indictment.

#### CONCLUSION

For the foregoing reasons, this Court should deny the writ.

Respectfully submitted,

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DeSantis, John James,  
Foundation & Structures,  
Inc., William E. Monaghan  
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APPENDIX A

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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William E. Monaghan  
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and MJD Construction Company,  
Inc.  
(201) 642-3900

COMPLAINT AND DEMAND FOR JURY TRIAL

\* To The Members of the Court: We have  
lodged 9 copies of the Exhibits A-D to  
the Complaint with the Clerk's Office.



WILLIAM MONAGHAN, THEODORE DESANTIS,  
JOHN JAMES, FOUNDATIONS & STRUCTURES,  
INC., WILLIAM E. MONAGHAN ASSOCIATES,  
and MJD CONSTRUCTION COMPANY, INC.

Plaintiffs,

vs.

DEAN DEAKINS, New Jersey Division of  
Criminal Justice; IRVING DUBOW, New  
Jersey Division of Criminal Justice;  
ROBERT GRAY, New Jersey Division of  
Criminal Justice; RONALD LEHMAN, New  
Jersey State Police; ALBERT G.  
PALENTCHAR, New Jersey Division of  
Criminal Justice; DONALD A. PANFILE, New  
Jersey Department of Treasury; WALTER  
PRICE, New Jersey Division of Criminal  
Justice; WILLIAM SOUTHWICK, New Jersey  
Division of Criminal Justice; RONALD  
SOST, New Jersey Division of Criminal  
Justice; JOHN DOE, an individual co-  
ordinating a search of the  
premises of Foundations & Structures,  
Inc.; JOHN DOE, an individual  
supervising investigators in the New  
Jersey Division of Criminal Justice; and  
JOHN DOE, an individual training  
investigators in the New Jersey Division  
of Criminal Justice,

Defendants.

Plaintiffs, William Monaghan,  
Theodore DeSantis, John James, Foundations  
& Structures, Inc. ("F. & S."), William E.  
Monaghan Associates ("Monaghan  
Associates"), and MJD Construction  
Company, Inc. ("MJD"), say:

1. This is a civil action  
arising under the United States  
Constitution, particularly under the  
Fourth, Fifth, Sixth and Fourteenth  
Amendments to the United States  
Constitution; under federal law,  
particularly the Civil Rights Act of 1964,  
Title 42 of the United States Code,  
Section 1983; and under the laws of the  
State of New Jersey.

2. The court has  
jurisdiction over this action pursuant to  
28 U.S.C. 1343 and principles of pendent  
jurisdiction.

4 a

3. The jurisdiction of the court is further invoked pursuant to 28 U.S.C. § 1331.

4. Venue is proper pursuant to 28 U.S.C. § 1391(b).

5. Plaintiff William Monaghan is a citizen of the United States of America and a resident of Seaville in the Township of Upper, Cape May County, State of New Jersey. Mr. Monaghan is a part owner of F. & S., Monaghan Associates and MJD.

6. Plaintiff Theodore DeSantis is a citizen of the United States of America and a resident of the Borough of Woodbine, County of Cape May, State of New Jersey. Mr. DeSantis is a part owner of F. & S., Monaghan Associates and MJD.

7. Plaintiff John James is a citizen of the United States of America and a resident of Somers Point, County of

5 a

Atlantic, State of New Jersey. Mr. James is a part owner of F. & S., Monaghan Associates and MJD.

8. Plaintiff F. & S. is a New Jersey corporation with its principal place of business at Route 49, Tuckahoe, New Jersey.

9. Plaintiff William E. Monaghan Associates ("Monaghan Associates") is a New Jersey general partnership with offices located at Route 49, Tuckahoe, New Jersey.

10. Plaintiff MJD Construction Company, Inc. ("MJD") is a New Jersey corporation with offices located at Route 49, Tuckahoe, New Jersey.

11. Defendants Dean Deakins, Irving DuBow, Robert Gray, Albert Palentchar, Walter Price, Ronald Sost, William Southwick are now, and at all times material hereto were, duly

appointed, employed and acting investigators of the State of New Jersey Division of Criminal Justice.

12. Defendant Donald A. Panfile is now, and at all times material hereto was, a duly appointed, employed and acting investigator of the State of New Jersey Department of Treasury.

13. Defendant Ronald Lehman is, and at all times material hereto, was, a duly appointed, employed and acting investigator of the New Jersey State Police.

14. Defendant John Doe, an individual coordinating a search of the premises of F. & S. on October 5, 1984, is, and at all times material hereto, was, duly appointed, employed and acting as an investigator, or in a related capacity with, the New Jersey Division of Criminal

Justice, or other division or agency of the State of New Jersey.

15. Defendant John Doe, an individual supervising investigators in the New Jersey Division of Criminal Justice, is, and at all times material hereto was, duly appointed, employed and acting as a supervisor of investigative personnel within the New Jersey Division of Criminal Justice.

16. Defendant John Doe, an individual training investigators in the New Jersey Division of Criminal Justice, is, and at all times material hereto was, duly appointed, employed and acting as a trainer of investigators in the New Jersey Division of Criminal Justice.

17. At all times material to this Complaint, except as expressly set forth in Counts IV, V, VI and VIII, all defendants acted toward plaintiffs under



color of the laws of the State of New Jersey and under color of the regulations, customs and practices of the New Jersey Division of Criminal Justice, the New Jersey Department of the Treasury, the New Jersey State Police, or similar state agency.

18. Plaintiffs sue all defendants in their individual capacities.

COUNT 1.

1. Plaintiffs incorporate Paragraphs 1-18 as if set forth fully herein.

2. On October 5, 1984, plaintiff William Monaghan was awakened at approximately 7:00 a.m. at his home by defendants Dean Deakins and Ronald Sost who identified themselves to Mr. Monaghan as investigators for the New Jersey Division of Criminal Justice. Mr. Monaghan

has a serious diabetic condition; he follows a strict morning routine which was completely upset by defendants' early arrival. Defendants gave no explanation or apology for the earliness of their call. Defendants' early arrival and insistence on a special "private" place to talk also upset the normal routine of other household members, causing distress to them and to Mr. Monaghan. Defendants Deakins and Sost sought to interview Mr. Monaghan and to gain his cooperation as a witness in connection with certain investigations being conducted in Cape May County. Mr. Monaghan had previously testified before a Grand Jury on related matters and had retained counsel as defendants Deakins and Sost knew. He stated that his attorney had instructed him not to answer questions about these matters except with the attorney present.

and called his attorney. After agreeing with the request of Mr. Monaghan's attorney not to interview Mr. Monaghan further until a meeting at 12:30 p.m. that day, defendants Deakins and Sost continued to pressure Mr. Monaghan concerning certain construction projects in Cape May County, threatening to make him and his construction companies the focus of further criminal investigations and possible prosecutions and otherwise attempting to coerce certain statements from Mr. Monaghan.

3. After leaving the home of plaintiff Monaghan early on the morning of October 5, 1984, defendants Deakins and Sost were seen to communicate with unknown individuals on a walkie-talkie.

4. On or about 7:30 a.m. on the morning of October 5, 1984, two of the defendants arrived at the home of Theodore

DeSantis in Woodbine, New Jersey. Mr. DeSantis was not home. Defendants used their vehicle to block Mr. DeSantis' driveway until Mr. DeSantis' son told them that Mr. DeSantis was at a job location in Sea Isle City. Two of the defendants approached Mr. DeSantis shortly thereafter on location in Sea Isle City, and addressed plaintiff DeSantis in a threatening and coercive manner concerning his acting as a witness in certain investigations which were ongoing in Cape May County. Mr. DeSantis had also previously testified before the Grand Jury and had retained counsel which defendants knew. When Mr. DeSantis told defendants that he refused to discuss the matter without consulting with counsel, said defendants left. Defendants Deakins and Palentchar returned at about 9:15 a.m., stating that plaintiff DeSantis had to

make an immediate decision and otherwise harassing and attempting to coerce Mr. DeSantis, despite Mr. DeSantis' refusal to discuss the matter without counsel present. Defendants Deakins and Palentchar left after Mr. DeSantis engaged in a telephone conversation with his attorney.

5. On or about 8:00 a.m. on the morning of October 5, 1984, defendants William Southwick, Donald A. Panfile, Irving DuBow, Ronald Lehman, Walter Price, and Robert Gray appeared at the premises of F. & S. in Tuckahoe, New Jersey and gained access to those premises by presenting to plaintiff John James a search warrant issued on October 4, 1984 by a judge of the Superior Court of New Jersey, Law Division, Mercer County, attached hereto as Exhibit A. Defendants Deakins, Palentchar and Sost arrived

subsequently and also gained access to the premises under authority of said search warrant.

6. Said warrant did not authorize the arrest of any individuals and did not state that the items subject to search were contraband or instrumentalities of a crime. Plaintiffs Monaghan, James and DeSantis have done business at the Route 49, Tuckahoe location for approximately 20 years.

7. The above named defendants, who remained on the property of F. & S. for approximately eight hours purporting at all times to act pursuant to the authority of the aforesaid warrant, proceeded to conduct a general and illegal search of the premises of F. & S. beyond the scope of the warrant in that:

1. All files, boxes, desks, drawers,



briefcases and receptacles within the office area of F. & S. were illegally searched although defendants were informed almost immediately how files were organized and were given an index so that files and records listed on the warrant could be located quickly.

2. Numerous unauthorized photographs were taken of the exterior and interiors of the office area, the entire F. & S. property which

consists of several acres, the exterior and interior of repair and maintenance buildings, and of construction machinery and vehicles no matter where located on the property.

3. All persons present on the premises, including non-employees of F. & S., were required to enter the main office and were illegally detained until each presented identification

4. The entrance to the property of F. & S. was barricaded for the entire day by placing one of defendants' vehicles across the open gate and vehicles which attempted to leave were illegally searched.

5. Serial numbers of construction machinery and vehicles located on the property and in out-buildings were illegally recorded.

6. Hundreds of documents outside the scope of the warrant

were taken away by defendants, including (a) personal papers of the individual plaintiffs; (b) financial records and other documents belonging to Monaghan Associates and MJD; (c) papers containing privileged communications between all of the plaintiffs and their attorneys. Many of these documents are essential to the conduct of the ongoing business of F. & S., Monaghan Associates and MJD.

8. While the search was progressing, plaintiff Monaghan was served with three Grand Jury subpoenae duces tecum, all issued on October 4, 1984, the day before the search. The first two subpoenae, attached to this Complaint as Exhibits B and C respectively, list as documents to be produced essentially the same documents listed on the warrant, demonstrating the unreasonable, unnecessary and pretextual nature of the search conducted on October 5, 1984.

9. The third subpoena, attached hereto as Exhibit D, contained a handprinted list of documents to be produced. The four file folders listed on the third subpoena were removed from F. & S. file cabinets by one or more of the defendants, taken into the defendants' possession and then returned to Mr. Monaghan together with the filled in

subpoena. Mr. Monaghan was then told by one of the defendants that the folders were not within the scope of the warrant and that he was to produce them before the Grand Jury on the date listed. The signature on the third subpoena is that of a Deputy Attorney General who was at no time present during the search. The unlawful and unreasonable nature of the search as shown by the fact that the defendants intended to conduct a search for documents outside the scope of the warrant and brought a blank subpoena with them for that purpose.

10. Said search was further illegally conducted in that all or some of the aforesaid defendants conducted themselves rudely and arrogantly, refusing, inter alia, to allow certain outsiders access to telephones and initially refusing to identify themselves,



and without consent or authority making unrestrained use of F. & S. telephones. One or more of the defendants also made statements intended to be overheard by plaintiffs that if defendants did not find what they were looking for at the offices of F. & S., defendants would "tear the house or houses apart" or words to a similar effect.

11. Said search was further illegally conducted in that plaintiffs were not given a complete and proper return and inventory as is required under the laws of the State of New Jersey.

12. The above actions of the defendants were assisted and aided by defendant John Doe, an individual coordinating said search, with whom Defendants communicated before, after and during said search.

13. All of the above actions of the named defendants and of defendant John Doe were in violation of plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution and plaintiffs were injured thereby. In particular and without limitation, the early morning arousal of Mr. Monaghan, the subsequent harassment and attempted coercion by defendants, the extreme nature of the search and the arrogant and deliberately intimidating manner in which it was conducted resulted plaintiff Monaghan's incurring a serious insulin reaction on the afternoon of October 5th, causing him great physical and emotional distress. Further, and without limitation, Mr. DeSantis has a serious heart condition, for which he takes medication and undergoes nitroglycerin treatments. He is under a

doctor's care and must avoid emotional stress. The aforementioned unlawful acts of the defendants caused Mr. DeSantis great emotional stress, posing great risk to his health and well-being. Further, and without limitation, Mr. James is severely afflicted with rheumatoid arthritis which is aggravated by emotional stress, and has other health problems. Mr. James is also under a doctor's care. The aforementioned unlawful acts of defendants caused Mr. James great emotional distress, further aggravating his arthritic condition and impairing his health.

14. All of the foregoing acts by defendants were done intentionally and maliciously or with reckless and wanton disregard for plaintiffs' constitutional rights.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James,

F. & S., Monaghan Associates and MJD demand judgment against Defendants Dean Deakins, Irving DuBow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual co-ordinating the aforesaid search, jointly and severally, for:

1. Compensatory damages;
2. Punitive damages;
3. Preliminary injunction requiring the return of all documents seized by the Defendants outside the scope of the warrant and all privileged documents;
4. Permanent injunction requiring the return of all documents seized by Defendants;

5. — Preliminary and permanent injunctions enjoining future unreasonable searches and seizures; and
6. Such other relief as the Court deems just, including costs of suit and attorneys fees.

COUNT 2.

1. Plaintiffs incorporate Paragraphs 1-18 and Paragraphs 1-14 of Count I as if set forth fully herein.
2. During the illegally conducted search of the premises of F. & S., Inc., one or more of the defendants made statements to Mr. Monaghan and Mr. DeSantis to the effect that any information which plaintiffs Monaghan and DeSantis might give at that time would be considered voluntary.

3. The illegally conducted search of the premises of F. & S. by defendants was initiated after plaintiffs Monaghan and DeSantis refused to speak with certain of the defendants without the presence of counsel, and was intended to harass, intimidate and coerce plaintiffs Monaghan and DeSantis into giving their cooperation with defendants' investigation.

4. Defendant John Doe, an individual co-ordinating the search of F. & S. premises, aided and assisted in the illegal use of the aforesaid search warrant as a tool to coerce and intimidate plaintiffs Monaghan and DeSantis.

5. All of the above actions of defendants were in violation of plaintiffs Monaghan and DeSantis' rights to liberty and due process under the Fifth and Fourteenth Amendments and plaintiffs



Monaghan and DeSantis were injured thereby.

6. The aforesaid actions of defendants were also in violation of the rights of all of the plaintiffs under the Fourth and Fourteenth Amendment in that the search of F. & S. premises under color of the warrant and the seizure of documents within and without the scope of the warrant was unlawfully motivated.

7. All of the foregoing acts by defendants were done maliciously and intentionally or with wanton and reckless disregard of the rights of the plaintiffs under the United States Constitution.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD demand judgment against Defendants Dean Déakins, Irving DuBow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A.

Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual co-ordinating and assisting the aforesaid search, jointly and severally, for:

1. Compensatory damages;
2. Punitive damages;
3. Permanent and preliminary injunction requiring the return of all documents seized by Defendants;
4. Preliminary and permanent injunctions against future use of warrants for purposes of intimidation and coercion; and
5. Such other relief as the Court deems just, including costs of suit and attorneys fees.

### COUNT 3.

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, and Paragraphs 1-7 of Count II as if fully set forth herein.

2. After plaintiffs DeSantis and Monaghan stated that they did not wish to discuss certain matters without counsel being present and after agreeing with counsel that further discussions would not take place, defendants (1) continued to pressure and coerce plaintiffs Monaghan and DeSantis without counsel being present; (2) attempted to use the execution of a search warrant to elicit communications from plaintiffs Monaghan and DeSantis without counsel being present; (3) seized numerous privileged communications between and among all plaintiffs and their attorneys and numerous privileged communications which were outside the scope of the warrant and otherwise deprived plaintiffs of rights, privileges and immunities secured to them by the Fifth, Sixth and Fourteen Amendments to the United States

Constitution and plaintiffs Monaghan and DeSantis were injured thereby.

3. Defendant John Doe, an individual co-ordinating the search of F. & S. premises, aided and assisted in the foregoing violations of plaintiffs' constitutional rights.

4. All of the foregoing acts by defendants were done maliciously and willfully or with wanton and reckless disregard of plaintiffs' constitutional rights.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD demand judgment against Defendants Dean Deakins, Irving DuBow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual

co-ordinating the aforesaid search,  
jointly and severally, for:

1. Compensatory damages;
2. Punitive damages;
3. Preliminary injunctions requiring the return of all privileged documents;
4. Preliminary and permanent injunction enjoining future seizure of privileged materials and interference with plaintiffs' right to counsel; and
5. Such other relief as the Court deems just, including costs of suit and attorneys fees.

COUNT 4.

1. Plaintiffs repeat  
Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, and Paragraphs 1-4 of Count III as if fully set forth herein.

2. The property located at Route 49 in Tuckahoe, New Jersey which was entered by defendants Sost, Deakins, DuBow, Gray, Lehman, Palentchar, Panfile, Price and Southwick was, and is lawfully owned by plaintiffs F. & S. and Monaghan Associates. Although said Defendants entered upon said property under color of state law, their actions thereafter exceeded the scope of the privilege conferred by the warrant and they committed a trespass ab initio on said premises in violation of the rights of plaintiffs F. & S. and Monaghan Associates and plaintiffs F. & S. and Monaghan Associates were injured thereby. Defendants also committed a trespass ab initio against personal property owned by each of the plaintiffs in seizing documents outside the scope of the warrant and all plaintiffs were injured thereby.



3. All of the aforementioned acts of the named defendants were done maliciously and willfully and in reckless and wanton disregard of rights secured to plaintiffs under the common law of the State of New Jersey.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD demand judgment against Defendants Dean Deakins, Irving DuBow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, jointly and severally, for:

1. Compensatory damages;
2. Punitive damages;
3. Preliminary and permanent injunctions requiring the return of all documents seized by Defendants;

4. Preliminary and permanent injunction enjoining future unlawful trespasses on plaintiffs' property and against plaintiffs' personal property; and
5. Such other relief as the Court deems just, including costs of suit and attorneys fees.

COUNT 5.

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, Paragraphs 1-4 of Count III, and Paragraphs 1-3 of Count IV as if fully set forth herein.

2. Although defendants Sost, Deakins, DuBow, Gray, Lehman, Palentchar, Panfile, Price and Southwick entered upon

the property of F. & S. and seized documents, books and records belonging to all of the plaintiffs under color of state law, their actions exceeded the authority conferred upon them by that state law. Said defendants wrongfully converted the property of the plaintiffs and plaintiffs were injured thereby.

3. Defendant John Doe, an individual co-ordinating the search of the premises of F. & S., aided and assisted in the wrongful conversion of plaintiffs' property in violation of plaintiffs' rights under the common law of the State of New Jersey and plaintiffs were injured thereby.

4. The aforementioned acts of said defendants were done maliciously and willfully, or with wanton and reckless disregard for the rights secured to the

plaintiffs under the common law of the State of New Jersey.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD demand judgment against Defendants Deakins, Irving DuBow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Donald Sost, and John Doe, an individual co-ordinating and assisting the aforesaid search, jointly and severally, for:

1. Compensatory damages;
2. Punitive damages;
3. Preliminary and permanent injunctions requiring the return of all privileged documents and all documents seized by the Defendants outside the scope of the warrant; and

4. Such other relief as the Court deems just, including costs of suit and attorneys fees.

COUNT 6.

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, Paragraphs 1-4 of Count III, Paragraphs 1-3 of Count IV, and Paragraphs 1-4 of Count V as if set forth fully herein.
2. The property upon which the offices of F. & S. are located is enclosed by a wire fence at all points from which access by road is possible. Heavy woods surround the remainder of the property. The single main entrance to the property is through a gate at the front of the property. Another gate in the fence at the front of the property is normally left

closed and was closed on October 5, 1984. At approximately 8:00 a.m. on October 5, 1984, defendants parked a vehicle across the front of the main gate, blocking all access and exit from the F. & S. property from that time until approximately 5:30 p.m.

3. By blocking said gate, defendants intended to confine all persons on the F. & S. property within the boundaries of said property and unlawfully did so confine these plaintiffs Monaghan and DeSantis, who were at all time aware of said unlawful confinement and were injured thereby.

4. Defendant John Doe, an individual co-ordinating the search of the premises of F. & S. property, at all times aided and assisted in the unlawful confinement of plaintiffs Monaghan and DeSantis who were injured thereby.



5. The acts of defendants described in this Count VII were done maliciously and willfully and with wanton and reckless disregard for the rights of plaintiffs Monaghan and DeSantis under the common law of the State of New Jersey.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, and John James demand judgment against Defendants Deakins, Irving DuBow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual co-ordinating and assisting the aforesaid search, jointly and severally, for:

1. Compensatory damages;
2. Punitive damages; and
3. Such other relief as the Court deems just, including costs of suit and attorneys fees.

COUNT 7.

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, Paragraphs 1-4 of Count III, Paragraphs 1-3 of Count IV, Paragraphs 1-4 of Count V and Paragraphs 1-6 of Count VI as if fully set forth herein.

2. The actions of defendants in confining plaintiffs Monaghan, DeSantis and James to the property of F. & S. unlawfully deprived them of their liberty without due process in violation of said plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution and plaintiffs were injured thereby.

3. Defendant John Doe, an individual co-ordinating the search of the premises of F. & S. property, aided and assisted in the aforementioned violations

of plaintiffs' constitutional rights and plaintiffs were injured thereby.

4. The acts of said defendants described in this Count VIII were done maliciously and willfully or with reckless and wanton disregard of plaintiffs' constitutional rights.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis and John James demand judgment against Defendants Dean Deakins, Irving DuBow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual co-ordinating and assisting the aforesaid search, jointly and severally, for:

1. Compensatory damages;
2. Punitive damages; and
3. Such other relief as the Court deems just,

including costs of suit and attorneys fees.

#### COUNT 8.

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, Paragraphs 1-4 of Count III, Paragraphs 1-3 of Count IV, Paragraphs 1-4 of Count V, Paragraphs 1-6 of Count VI and Paragraphs 1-4 of Count VII as if fully set forth herein.

2. The acts of defendants described in the foregoing Counts I-VIII constituted extreme and outrageous conduct intentionally or recklessly causing physical injury and severe emotional distress to plaintiffs Monaghan, DeSantis and James.

WHEREFORE, Plaintiffs William Monaghan, Theodore, DeSantis and John James demand judgment against Defendants

Dean Deakins, Irving DuBow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual co-ordinating and assisting the aforesaid search, jointly and severally, for:

1. Compensatory damages;
2. Punitive damages;
3. Preliminary and permanent injunctions enjoining defendants from intentionally inflicting emotional distress on plaintiffs Monaghan and DeSantis in the future;
- and 4. Such other relief as the Court deems just, including costs of suit and attorneys fees.

COUNT 9.

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, Paragraphs 1-4 of Count III, Paragraphs 1-3 of Count IV, Paragraphs 1-4 of Count V, Paragraphs 1-6 of Count VI, Paragraphs 1-4 of Count VII and Paragraphs 1-2 of Count VIII as if fully set forth herein.

2. At all times relevant to this Complaint, Defendants Deakins, Sost, Palentchar, DuBow, Gray, Price, Southwick, investigators with the New Jersey Division of Criminal Justice, were acting under the direction and control of Defendant John Doe, a supervisor of investigators in the New Jersey Division of Criminal Justice.

3. Said defendant John Doe had a duty to instruct, supervise, control and discipline the investigator defendants to execute search warrants and conduct



investigations in a manner consistent with plaintiffs' rights under the United States Constitution and under the common laws of the State of New Jersey.

4. Said defendant John Doe, acting under color of state law, negligently, or intentionally and willfully, failed to properly instruct, supervise, control and discipline said defendants.

5. Said defendant John Doe had knowledge or, had he or she diligently exercised his or her duty to instruct, supervise, control and discipline on a continuing basis, should have had knowledge that the wrongs done, as heretofore alleged, were about to be committed. Said defendant John Doe had power to prevent or aid in preventing the commission of said wrongs, could have done so by reasonable diligence, and, acting

under color of state law, neglected or intentionally refused to do so.

6. Said defendant John Doe, directly or indirectly, under color of law, approved or ratified the unlawful, deliberate, malicious, reckless and wanton conduct of the defendant members of the New Jersey Division of Criminal Justice.

7. As a direct and proximate result of the acts of said defendant John Doe, more particularly described in Paragraphs 4-6 of this Count IX, plaintiffs have been deprived of their rights and privileges under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under the common laws of the State of New Jersey.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD

demand judgment against Defendant John Doe, an individual supervising investigators in the New Jersey Division of Criminal Justice, jointly and severally for:

1. Compensatory damages;
2. Punitive damages;
3. Preliminary injunctions requiring the return of all documents seized by the Defendants outside the scope of the warrant and all privileged documents;
4. Permanent injunction requiring the return of all documents seized by Defendants; and
5. Such other relief as the Court deems just including costs of suit and attorneys fees.

COUNT 10.

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, Paragraphs 1-4 of Count III, Paragraphs 1-3 of Count IV, Paragraphs 1-4 of Count V, Paragraphs 1-6 of Count VI, Paragraphs 1-4 of Count VII, Paragraphs 1-2 of Count VIII, and Paragraphs 1-7 of Count IX as if fully set forth herein.

2. Defendant John Doe, an individual training and instructing the defendant investigators in the New Jersey Division of Criminal Justice, had a duty to train and instruct said defendant investigators to execute search warrants and conduct investigations in a manner consistent with plaintiffs' rights under the United States Constitution and under state law.

3. Said defendant John Doe, acting under color of law, negligently or intentionally and willfully failed to properly train and instruct said defendant investigators.

4. As a direct and proximate result of failure described in Paragraph 3 of this Count X, plaintiffs have been deprived of their rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under the common laws of the State of New Jersey.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD demand judgment against Defendants Dean Deakins, Irving DuBow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual

training and instructing the defendant investigators in the New Jersey Division of Criminal Justice, jointly and severally, for:

1. Compensatory damages;
2. Punitive damages;
3. Preliminary injunctions requiring the return of all documents seized by the Defendants outside the scope of the warrant and the return or all privileged documents;
4. Permanent injunction requiring the return of all documents seized by Defendants; and
5. Such other relief as the Court deems just, including costs of suit and attorneys fees.



MCGAHN, FRISS & MILLER  
 1421 Atlantic Avenue  
 Atlantic City, New Jersey 08401  
 Attorneys for William Monaghan,  
 Foundations & Structures,  
 William E. Monaghan Associates, and  
 MJD Construction Company, Inc.

By: /s/ Patrick T. McGahn, Jr.  
 Patrick T. McGahn, Jr.

CLAPP & EISENBERG  
 A Professional Corporation  
 80 Park Plaza  
 Newark, New Jersey 07102  
 Attorneys for Theodore DeSantis  
 and Co-Counsel for  
 Foundations & Structures, Inc.,  
 William E. Monaghan Associates  
 and MJD Construction Company, Inc.

By: /s/ Kathy M. Hooke  
 Kathy M. Hooke

DEMAND FOR JURY TRIAL

Plaintiffs William Monaghan,  
 Theodore DeSantis, John James, Foundations  
 & Structures, Inc., William E. Monaghan  
 Associates and MJD Construction Company,  
 Inc. hereby demand a trial by jury with  
 respect to all Counts of the Complaint.

MCGAHN, FRISS & MILLER  
 1421 Atlantic Avenue  
 Atlantic City, New Jersey 08401  
 Attorneys for William Monaghan,  
 Foundations & Structures,  
 William E. Monaghan Associates, and  
 MJD Construction Company, Inc.

By: /s/ Patrick T. McGahn, Jr.  
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 80 Park Plaza  
 Newark, New Jersey 07102  
 Attorneys for Theodore DeSantis  
 and Co-Counsel for  
 Foundations & Structures, Inc.,  
 William E. Monaghan Associates  
 and MJD Construction Company, Inc.

By: /s/ Kathy M. Hooke  
 Kathy M. Hooke

## APPENDIX B

SUPERIOR COURT OF NEW JERSEY  
Law Division

[Seal]

Chambers of	Mercer County Court
Samuel D. Lenox, Jr.	House, P.O. Box 8068
Assignment Judge	Trenton, New Jersey
	08650

Mercer County

June 28, 1985

Robert B. Donovan, Deputy Attorney General  
Division of Criminal Justice  
25 Market Street CN-085  
Trenton, New Jersey 08625

Re: In the Matter of a Search  
Warrant Dated October 4, 1984

Dear Mr. Donovan:

I have your letter of June 26, 1985 providing "a list of those individuals who have made factual assertions that (your) office wishes to be the subject of a plenary hearing."

This letter does not provide full compliance with the order of April 15, 1985. That order provides:

... the State of New Jersey shall give notice to the Court and to defendants of factual assertions, if any, made in said affidavits which it wishes to be the subject

of a plenary hearing.

The order requires notice be given of both the identity of the witnesses and the substance of the factual assertions being contested. You should designate those portions of the affidavits which you dispute and provide your own factual assertions with regard thereto. It is only by framing the issues in this manner that the parties may prepare to present evidence at the plenary hearing.

Very truly yours,

/s/ Samuel D. Lenox, Jr.  
Samuel D. Lenox, Jr., A.J.S.C.

SDL,Jr.:mt

CC: Kathy M. Hooke, Esquire  
Sharon Donofrio, Esquire

54 a

APPENDIX C

SUPERIOR COURT OF NEW JERSEY  
Law Division

[Seal]

Chambers of	Mercer County Court
Samuel D. Lenox, Jr.	House, P.O. Box 8068
Assignment Judge	Trenton, New Jersey
	08650

Mercer County

May 12, 1986

Clapp & Eisenberg  
80 Park Plaza  
Newark, New Jersey 07102

Attention: Kathy M. Hooke, Esquire

Re: In the Matter of a Search  
Warrant Dated October 4, 1984

Gentlemen:

In view of the time lapse described in your letter of May 7, 1986, I consider the motion to have been impliedly withdrawn. If you wish I will enter a formal order dismissing it without prejudice.

Any further judicial activity in connection with this matter should be brought before the court by the filing of new pleadings.

55 a

Very truly yours,

/s/ Samuel D. Lenox, Jr.  
Samuel D. Lenox, Jr., A.J.S.C.

SDL,Jr.:mt

CC: Robert B. Donovan, DAG  
Sharon Donofrio, Esquire  
Patrick T. McGahn, Esquire



## APPENDIX D

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MERCER COUNTY

-----:  
IN THE MATTER OF A SEARCH : STENOGRAPHIC  
WARRANT DATED OCTOBER 4, 1984: TRANSCRIPT  
-----: OF MOTION  
In Camera Hearing

Place: Mercer County Courthouse  
Trenton, New Jersey

Date: March 11, 1985

B E F O R E:

HONORABLE SAMUEL D. LENOX, JR.,  
A.J.S.C.

Transcript Ordered By:

Patrick T. McGahn, Jr., Esq.  
(Messrs. McGahn, Friss, Gindhart &  
Miller)

A P P E A R A N C E S:

(See inside)

THE COURT: Well --

MR. DONOVAN: Your Honor, I see no reason why any arguments as to the attorney-client privilege can't be raised. Any arguments as to the sealed documents cannot be raised in the immediate future. If they research that, they are going to make arguments dealing with other aspects of the material or the manner in which materials were seized, Your Honor. Those arguments can well be made at any point in time.

THE COURT: Well --

MR. MCGAHN: Your Honor, I would submit --

THE COURT: They can also be made before any judge.

MR. DONOVAN: Correct, your Honor.

THE COURT: That is a separate motion. Rule 4:5-7 is entitled Motion to Suppress Evidence and for return of property, and it requires a motion by your client and it can be made at any time until after 30 days from the date of the plea, if an indictment is returned. That's really not what I have before me. I have an Order to Show Cause in connection with sealed documents. If you file another motion, it may not come to me because that motion is typically heard by a judge of the Criminal Division. Right now, my only question involves the documents under seal.

MS. HOOK: Well, as to those documents, your Honor, we still think it

would be helpful, your Honor, for you to have the applicable law.

THE COURT: Oh, certainly, yes. I am talking about your statement that you are going to broaden the issue. You are not going to broaden the issue on this Order to Show Cause because the Order to Show Cause frames the issue. If you intend to raise other issues, you will do so by your own motion.

MS. HOOKE: And is your Honor saying that that motion should be brought in the normal course and assigned out under the normal course?

THE COURT: You will file it and we will decide what we will do with it procedurally.

MS. HOOKE: Okay.

THE COURT: I don't know. I have to see.

# REPLY BRIEF



JAN 21 1987

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

DEAN DEAKINS, New Jersey Division of Criminal Justice; IRVING DUBOW, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; RONALD LEHMAN, New Jersey State Police; ALBERT G. PALENTCHAR, New Jersey Division of Criminal Justice; DONALD A. PANFILE, New Jersey Department of Treasury; WALTER PRICE, New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundation & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice,

*Petitioners,*

vs.

WILLIAM MONAGHAN, THEODORE DESANTIS,  
JOHN JAMES, FOUNDATIONS & STRUCTURES, INC.,  
WILLIAM E. MONAGHAN ASSOCIATES, AND  
MJD CONSTRUCTION COMPANY, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United  
States Court Of Appeals For The Third Circuit**

**PETITIONERS' REPLY BRIEF**

ALLAN J. NODES  
*Attorney of Record*

ALLAN J. NODES  
STEVEN PASTERNAK  
LARRY R. ETZWEILER  
Deputy Attorneys General  
Division Of Criminal Justice  
*Of Counsel &  
On the Brief*

W. CARY EDWARDS  
Attorney General of New Jersey  
Richard J. Hughes Justice Complex  
Trenton, New Jersey 08625  
(609) 292-9086

### QUESTIONS PRESENTED FOR REVIEW

1. Must federal courts, by virtue of a 42 U.S.C. sec. 1983 action for the return of property seized pursuant to a warrant, filed by the targets of an ongoing state grand jury investigation, intrude into that investigation despite the *Younger* abstention doctrine where the federal complainants may seek redress from the state court which supervised the grand jury and issued the warrant?
2. Are federal courts absolutely barred from exercising their discretion to dismiss an ancillary claim for damages when they properly abstain from the equitable portion of a 42 U.S.C. sec. 1983 action?
3. Have the questions presented for review been rendered moot by the return of one indictment against some of the respondents even though an active investigation is still continuing and further indictments may be returned?

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## STATEMENT OF THE CASE

Petitioners rely upon their Statement of the Case as set forth in their petition for *certiorari*. This brief, submitted pursuant to *Rule 22.5* and *Rule 22.6*, both replies to respondents' brief in opposition and also apprises this Court that even though an indictment has been returned in this case, the investigation into related charges is still continuing. This latter fact is pertinent to respondents' contention that the petition is moot.

## REASONS FOR GRANTING THE WRIT

### POINT I. THE QUESTIONS ARE FAIRLY PRESENTED

Respondents contend that the issues presented in the petition do not relate to questions raised before and decided by the Court of Appeals for the Third Circuit. Respondents' own arguments bely this contention.

#### A. Petitioners' First Question Is Fairly Presented and Warrants Granting the Writ<sup>1</sup>

Respondents argue that the third circuit did not require the lower courts to ignore *Younger v. Harris*, 401 U.S. 37 (1971) precepts and intrude into ongoing state grand jury investigations where 42 U.S.C. sec. 1983 complainants seeking injunctive relief may obtain redress from the state court which supervises the grand jury. Rather, respondents contend that the third circuit merely ruled that *Younger* applies only where the federal complainants can litigate their claim within the pending state proceeding. Respondents

---

<sup>1</sup> Respondents have reversed the order of the questions raised by petitioners. We have adhered to the original sequence.

submit that because the state grand jury itself is not a forum in which they can present their claims, *Younger* abstention is not required.

This interpretation of the third-circuit's holding does not demonstrate that our petition presents a different question from that presented to the third circuit. Instead, it emphasizes the importance of the question presented and demonstrates the congruence of the question presented for review and the issue resolved by the third circuit.

The third circuit explicitly found that respondents have an adequate state forum in which to present their claims—the state court which supervises the grand jury. Moreover, it is not contested that adversarial litigation cannot take place directly before a state grand jury. The third circuit has ruled, however, that unless the prospective federal litigants can present their claims within the ongoing proceeding (*i.e.*, the grand jury), federal intervention is mandated.

The result of this ruling is that federal courts must always intrude upon matters which are pending before state grand juries because adversarial litigation can never occur before the grand jury. This ruling is not in consonance with this Court's rulings concerning that aspect of the *Younger* doctrine which provides that a state forum need only be available. See, *e.g.*, *Ohio Civil Rights Comm'n v. Dayton Schools, Inc.*, — U.S. —, S. Ct. 2718, 2724 (1986). Respondents can fairly present their constitutional claims before the state court which supervises the grand jury (and which issued the warrant which underlies this action) without unduly interfering with the ongoing investigation. They should be required to litigate their constitutional

claims in the state court and the federal courts should abstain.

#### **B. Petitioners' Second Question Is Fairly Presented and Warrants Granting the Writ**

Petitioners' second question for review asked whether a district court is absolutely barred from exercising its discretion to dismiss an ancillary claim for damages when (as in this case) it properly abstained from the equitable portion of the 42 U.S.C. sec. 1983 action. Citing exclusively to third circuit precedent, respondents argue that petitioners' second question "is hardly worthy of the Court's *certiorari* jurisdiction" and, indeed, is not even presented in this case because "[t]he actual holding of the circuit court in this portion of the opinion simply reaffirms basic principles of *stare decisis*." (Respondents' brief, pg. 18). If respondents are correct that the third circuit's ruling simply adhered to its prior precedent on this question, then that fact supports, rather than detracts from the reasons for granting *certiorari*. Moreover, that fact would firmly establish that petitioners' second question is raised in this case. Through a line of established and recurring precedent, the third circuit has locked itself into a rule of law which has incorrectly resolved the second question, thereby precluding the necessary exercise of discretion embodied in district courts handling abstention cases. This improper preclusion does violence to the reason underlying the abstention doctrine in cases such as this case. See Petitioners' petition, pg. 18; see also Respondents' brief, pg. 23 (that "a stay rather than dismissal may still interfere with the state court proceeding touches on discretionary factors which may have influenced the district court in dismissing the



complaint in its entirety"). Only this Court can correct the third circuit's self-imposed error. Significantly, respondents do not assert that the third circuit is adhering to precedent established by other circuit courts or by this Court, and respondents fail to cite precedent from other courts or this Court which addresses this significant question.

Disingenuously, respondents also claim that their claims for damages "are unable to be adjudicated in the state proceeding which requires abstention." (Respondents' brief, pg. 20). That is, respondents again focus upon the *ex parte* grand jury proceeding and contend that the grand jury's inability to award them damages demonstrates that the district court must retain the claims for damages. This contention simply highlights again the third circuit's error in failing to look to the state judiciary (as opposed to the state grand jury) as an adequate and available forum in which respondents can raise all of their claims, both constitutional and common law, both equitable and legal. See Petitioner's petition, pgs. 11 to 13; see also *Ohio Civil Rights Comm'n v. Dayton Schools, Inc.*, *supra*. For these reasons, this Court should grant the writ of *certiorari* to review both questions presented by petitioners.

## POINT II. THE QUESTIONS PRESENTED ARE NOT MOOT

Petitioners' request for abstention is based primarily on the pendency of an ongoing state grand jury investigation. Respondents contend that since an indictment has been returned against some of them, "[i]t is apparent that the grand jury has concluded its investigation in this matter" (Respondents' brief,

pg. 43) and that the questions presented are, therefore, moot.

Succinctly stated, the investigation has not ended and the questions presented are not moot. Pursuant to *Rule 22.6*, petitioners have included in the appendix to this brief a memorandum which notes that a criminal allegation with respect to some of the respondents "remains the subject of a continuing investigation for which state grand jury subpoenas have been issued." (Appendix A). Moreover, "certain of the seized documents [which form the subject matter of this case] are relevant" to this investigation. *Id.*

Beyond this, the controversy is still quite alive. Respondents continue to seek a federal court hearing upon their demand for equitable relief for the return of their papers and have not agreed that the indictment's return eliminates the need for the district court to comply with the mandate of the third circuit.

There is no doubt that if respondents' complaint had been filed after the indictment was returned, abstention would be mandated. *Younger v. Harris*, *supra*. However, respondents will seek to avoid this bar by arguing that since "proceedings of substance" (Respondents' brief, pg. 31, note 8) had occurred prior to the return of the indictment, the federal district court should act on their claims as if the indictment had not been returned. See *Hicks v. Miranda*, 422 U.S. 332 (1975). On this basis they will claim that abstention, which would normally be required following an indictment, should not be permitted in this case. Respondents, thus, will argue that for purposes of determining their requests for equitable relief, the indictment should not be considered. Thus, respondents intend, and the third circuit opinion per-



mits, this matter to be presented to the district court as if the indictment had not been returned. Based on these facts, it is misleading for respondents to suggest that the return of the indictment renders this question moot.

Hence, respondents' mootness argument is both factually in error and flawed in its reasoning. This Court should grant the petition for *certiorari*.

### POINT III. RESPONDENTS HAVE NOT PROPERLY REPRESENTED THE RECORD

Initially, petitioners object to the inclusion of Appendices B and C in respondents' brief in opposition to *certiorari*. These appendices are not part of the record and petitioners have had no opportunity to respond to these documents.

Relying upon these appendices, respondents suggest that the state court proceedings pertinent to the unsealing of the documents have been permitted to lapse. (Respondents' brief, pg. 11). This is not true, as demonstrated by appendices B and C to this brief.<sup>2</sup> Indeed, on December 10, 1986, respondents DeSantis and Monaghan apprised the state court of their fourth amendment contention that some of the "documents

<sup>2</sup> We are aware that we are technically prohibited from including the documents which form appendices B and C to this brief. Rule 22.6 allows the inclusion of matters outside the record only if they were "not available at the time of the party's last filing." However, these documents are in response to documents which respondents improperly included in their brief, and in fairness we should be permitted to respond to them. If this Court concludes otherwise, then we urge that it also foreclose any consideration of or reliance upon the documents which respondents improperly included.

... were outside the scope of the warrant." (Appendix C, pg. 5a).

Respondents also assert that "Judge Lenox expressly declined to hear any issues other than those relating to attorney-client and/or work product privileges." (Respondents' brief, pg. 41). In support of their assertion, respondents rely upon their own appendix D, which itself belies this assertion. Judge Lenox did not foreclose consideration of any other issues; he simply apprised respondents that they had to file a motion in accordance with New Jersey practice in order to raise these issues.

In short, this Court should not permit respondents to distort the record. Petitioners have accurately summarized the proceedings below, and have demonstrated that the petition for a writ of *certiorari* should be granted.

### CONCLUSION

Based on all of the briefs in this case, petitioners urge that federal courts should abstain from a 42 U.S.C. sec. 1983 action for the return of property seized pursuant to a warrant and being considered by a state grand jury which is filed by targets of the ongoing state grand jury investigation. This is an important federal issue concerning which the circuits are in conflict. Indeed, precisely this issue is raised in the petition for *certiorari* in *Potomac Electric Power Co. v. Sacks*, 802 F.2d 1527 (4th Cir. 1986), petition for *certiorari* filed December 1, 1986 (Docket No. 86-871).

The present case also involves a second, related issue which has not been but should be, decided by this Court. Petitioners urge that if a federal court

may abstain from a section 1983 action for the return of property, it may also dismiss an ancillary claim for damages brought in the same action.

These issues strike at the very base of our federal system. Federal courts, under the guise of a 42 U.S.C. 1983 action, may be used by targets of a criminal investigation to intrude upon and obstruct that investigation. Congress could not have envisioned, and this Court's prior opinions have not sanctioned interference of this type. This Court should grant *certiorari* and require the federal courts to abstain from interference with state grand jury proceedings in situations in which the state courts which supervise the grand juries provide a fully adequate forum for correcting alleged violations of federally secured rights.

Respectfully submitted,

W. CARY EDWARDS  
Attorney General Of New Jersey  
*Attorney for Petitioners*

By /s/ ALLAN J. NODES  
ALLAN J. NODES  
Deputy Attorney General  
*Attorney of Record*

ALLAN J. NODES  
STEVEN PASTERNAK  
LARRY R. ETZWEILER  
Deputy Attorneys General  
Division of Criminal Justice  
Appellate Section

*Of Counsel and on the Brief*

## **APPENDIX**



**APPENDIX A**

**STATE OF NEW JERSEY  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF CRIMINAL JUSTICE**

**MEMORANDUM**

DATE: 1/15/87

TO: DAG Allan J. Nodes  
Appellate Section

FROM: DAG Robert B. Donovan  
Organized Crime & Racketeering Task Force

SUBJECT: Foundations and Structures, Inc.

This is to advise you that the affidavit which was the basis of the application for the search warrant executed at the premises of Foundations and Structures detailed, among other allegations, an allegation pertaining to a corrupt scheme to procure the selection of real estate owned by both Foundations and Structures and Monaghan Associates as the location for the CMCMUA landfill. The allegation is that in return for the selection of their real estate as the landfill site, principals in F&S and Monaghan Associates would generate and transmit a \$200,000 bribe to public officials in Cape May County. That allegation, to which certain of the seized documents are relevant, remains the subject of a continuing investigation for which state grand jury subpoenas have been issued.

/s/ R.B.D.  
R.B.D.

c: Deputy Director Stevens  
Section Chief Robillard

## APPENDIX B

**CLAPP & EISENBERG**  
 A PROFESSIONAL CORPORATION  
 COUNSELLORS AT LAW  
 50 PARK PLAZA  
 NEWARK, N.J. 07102

\_\_\_\_\_  
 (201) 642-3900 (212) 571-0240

\_\_\_\_\_  
 CABLE CLAPPEISEN  
 TWX 7109954409  
 TELECOPIER (201) 642-7413

\_\_\_\_\_  
 ATLANTIC CITY OFFICE  
 1421 ATLANTIC AVENUE  
 ATLANTIC CITY, N.J. 08401  
 (609) 347-7330

November 26, 1986

Hon. Samuel D. Lenox, Jr.  
 Assignment Judge  
 Superior Court of New Jersey  
 Law Division: Mercer County  
 Courthouse  
 Trenton, N.J. 08650

Re: In re A Search Warrant Dated October 4, 1984

Dear Judge Lenox:

Pursuant to my conversations with your chambers and DAG Donovan, I am advising the Court that Mr. Donovan has agreed that the motion made by the State of New Jersey to unseal documents should be heard by the trial judge, who is Judge Isaac Serata in Cumberland County. Mr. Donovan has also agreed to adjourn the motion to December 19, 1986 in order to allow Judge Serata time

to become familiar with the papers. It is my understanding that your staff will mail the motion papers directly down to Judge Serata.

Respectfully,

/s/ KATHY M. HOOKE  
 KATHY M. HOOKE

KMH/lrs

cc: DAG Robert Donovan

## APPENDIX C

**CLAPP & EISENBERG**  
A PROFESSIONAL CORPORATION  
COUNSELLORS AT LAW  
50 PARK PLAZA  
NEWARK, N.J. 07102

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(609) 347-7330

December 10, 1986

Honorable Isaac I. Serta  
Superior Court Judge  
Cumberland County Court House  
Bridgeton, New Jersey 08302

Re: State v. Catanoso, et al.  
SGJ-168-86-9

Dear Judge Serata:

Please accept this letter memorandum in lieu of formal memorandum of law submitted on behalf of defendants Theodore DeSantis and William Monaghan in answer to the motion of the State of New Jersey to unseal certain documents and to submit others to a special master for determination of the applicability of the attorney-client and work product privileges. The motion is returnable December 19, 1986. Defendant DeSantis and Monaghan oppose the motion in part as set forth below.

The documents in question were seized pursuant to a state grand jury warrant issued on October 4, 1984. A copy of that warrant is annexed as Exhibit A to the Certificate of Kathy M. Hooke, submitted herewith. The documents which are the subject of this motion were sealed by consent of counsel during a later inventory, pending a determination of the applicability of attorney-client and work product privileges. For various reasons not immediately relevant here, opposition to the State's original motion to unseal focused primarily on the applicability of the attorney-client and work-product privileges. The documents as to which a privilege was asserted were identified in a series of 13 affidavits, Exhibits 5-18 to the State's Verified Petition and the factual basis for assertion of the privileges was set forth.

*Exhibit 23:*

Exhibit 23 to the State's Verified Petition purports to identify by number, those documents originally sealed but not identified in the Affidavits. Defendants DeSantis and Monaghan agree that the documents identified on Exhibit 23 can be unsealed *except as follows*:

**(a) Documents Which Were Outside the Scope of the Warrant:**

Many of the documents listed on Exhibit 23, while not privileged, are dated *prior to* September 8, 1978. These documents are listed in the Certification of Kathy M. Hooke, ¶4. Defendants object to the unsealing of the documents listed in ¶4 on the grounds that they were seized in violation of defendants' rights to be free from unreasonable search and seizure.

Other documents listed on Exhibit 23 are documents connected with a landfill operated by Foundations & Structures in Woodbine, New Jersey. The legal matters arising in connection with the Woodbine landfill are described in detail in the Affidavits of William E. Monaghan



and Joseph Ferrante, Jr., Exhibits 5, 6 and 12 to the State's Verified Petition. Unlike the property in Woodbine which was the subject of negotiations with the Cape May County M.U.A., documents connected with the Woodbine landfill were not the subject of the warrant. The Woodbine landfill documents listed on Exhibit 23 which should be protected from unsealing as being outside the subject matter scope of the warrant are:

File Folder: "Freeholders and M.U.A. v. DEP"  
(All documents)

File Folder: "Landfill Closure and Bills"  
(All documents)

File Folder: "Newspaper Articles—Woodbine Landfill"  
(All documents)

File Folder: "F. & S. copies—S. Ayres Answers to Interrogatories"  
(All documents)

File Folder: "Landfill Rate Increase"  
(All documents)

A third category appearing on Exhibit 23 which is outside the scope of the warrant contains documents having to do with the Cape May County Grand Jury investigation in 1983-1984. These documents consist mainly of notes of confidential communications between defendants and counsel concerning defendants' appearances before the Cape May County Grand Jury. The documents were seized despite being clearly marked "M.U.A. Grand Jury" and despite the fact that documents in connection with the County Grand Jury hearings were not among these categories of documents enumerated by the warrant. The few unprivileged documents from the "M.U.A. Grand Jury" file must therefore not be unsealed because these documents were not within the scope of the original warrant.

**(b) Documents Which Are The Subject Of Affidavits:**

The following documents are improperly listed on Exhibit 23 since they are the subject of affidavits as indicated below:

File Folder: "Possible Sale/Woodbine Property"  
02289—Affidavit of William E. Monaghan

File Folders: "Landfill Rate Increase"\* 02676—  
Affidavit of William E. Monaghan  
02590—Affidavit of Vince Fabietti

**(c) Documents Which Defendants Do Not Have Copies Of:**

There are four documents listed in Exhibit 23 which defendants have not been able to locate copies of as follows:

File Folder: "Possible Sale/Woodbine Property"  
02197  
02199

File Folder: "Landfill Rate Increase"\*  
02598

File Folder: "M.U.A. Grand Jury"\*  
02679

Defendants DeSantis and Monaghan have no objection to the unsealing of all other documents listed on Exhibit 23.

Defendants oppose the unsealing of these documents until they can travel to Trenton and determine whether the documents are indeed non-privileged.

*Exhibit 25:*

Exhibit 25 to the State's Verified Petition purports to identify documents which should be submitted to a special

\* Also covered by objection (a).

master for determination of the applicability of the privilege asserted. Although defendants agree to this procedure if necessary, defendants contend that the documents listed on Exhibit 25 which were outside the scope of the warrant *need not be examined for applicability of the privilege*. Although no date problems arise in connection with the documents listed on Exhibit 25, the file folders dealing either with the Woodbine Landfill or with the Cape May County Grand Jury Investigation 1983-1984 must be eliminated for the reasons discussed above. Thus, the following folders need not be submitted to anyone:

File Folder: "Freeholders and M.U.A. v. DEP"  
(All documents)

File Folders: "Landfill Closure and Bills"  
(All documents)

File Folder: "Newspaper Articles—Woodbine Landfill"  
(All documents)

File Folder: "F.&S. Copies—S. Ayres Answer to Interrogatories"  
(All documents)

File Folder: "Landfill Rate Increase"  
(All documents)

File Folder: "M.U.A. Grand Jury"  
(All documents)

If the file folders outside the scope of the warrant are eliminated from Exhibit 25, only three file folders remain in dispute, i.e., "Possible Sale/Woodbine Property" (25 documents); "Newspaper Articles—M.U.A. Land Purchase" (7 documents); and "Pinelands Application" (34 documents). Given this relatively small number of documents and to avoid a cumbersome and expensive reference to a special matter, defendants DeSantis and Monaghan respectfully request that the Court personally conduct whatever *in camera* review that it may find appropriate.

Finally, defendants agree with DAG Donovan's statement in his cover letter that there are two general legal issues to be decided with respect to the remaining disputed documents: that is, (1) whether enclosures in an otherwise privileged communication are also privileged and (2) whether the privilege extends to experts engaged to assist in the legal representation. Once procedural matters with respect to this motion are clarified, defendants would like the opportunity to brief these issues.

Respectfully submitted,

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A Professional Corporation  
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By: /s/ KATHY M. HOOKE  
KATHY M. HOOKE

McGAHN, FRISS & MILLER  
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WILLIAM MONAGHAN

cc: DAG Robert Donovan  
(Federal Express)  
All Defense Counsel  
Clerk of the Superior Court-  
Law Division-Criminal Div.

FEDERAL EXPRESS

**AMICUS CURIAE**

**BRIEF**



2  
NO. 86-890

IN THE SUPREME COURT  
OF THE UNITED STATES

Supreme Court, U.S.  
FILED

DEC 24 1986

JOSEPH F. SPANIOL, JR.  
CLERK

DEAN DEAKINS, NEW JERSEY DIVISION  
OF CRIMINAL JUSTICE, et al.,

Petitioners

v.

WILLIAM MONAGHAN, et al.

Respondents

BRIEF OF AMICI CURIAE IN SUPPORT  
OF PETITIONERS BY THE COMMONWEALTH  
OF PENNSYLVANIA AND THE 11 AMICI  
APPEARING ON INSIDE COVER

---

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20 p/2

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Madison, WI 53701

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### INTEREST OF THE AMICI

The amici states, through their law enforcement officers, are responsible for enforcing the criminal statutes enacted by their respective legislatures. In furtherance of this responsibility, the law enforcement officers regularly institute, or appear in connection with, ongoing criminal proceedings at various stages of a criminal prosecution. As the Court has recognized many times in the past, this responsibility is an important one from the standpoint of protecting the health and welfare of the citizens of the several states.

This case presents the Court with the opportunity to re-emphasize the proper balance between state and federal

authority in the important area of criminal law enforcement. By declining to abstain from considering issues pending before, or capable of being presented to, the criminal courts of the State of New Jersey, the Court of Appeals for the Third Circuit unjustifiably has narrowed the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971). This doctrine has been recognized by the Court as extremely important since it reflects the proper respect for state functions and "a continuance of the belief that the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." Id., 401 U.S. at 44. The principles of federalism and comity

that the Court has found to be "central" to our form of government have been misapplied by the court below, thus calling for the Court's granting a writ of certiorari to the Court of Appeals for the Third Circuit.

#### REASONS FOR GRANTING THE WRIT

In Younger v. Harris, 401 U.S. 37 (1971), the Court held that, absent special circumstances, a federal court should abstain from enjoining or interfering with a pending state criminal prosecution. The doctrine of abstention has been expanded over the years to include situations not strictly connected with criminal prosecutions,<sup>1</sup> but nowhere are the states' interests

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<sup>1</sup>See, e.g., Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., No. 85-488 (June 27, 1986) (administrative agency proceedings involving claim of employment discrimination); Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982) (state bar disciplinary proceedings); Trainor v. Hernandez, 431 U.S. 434 (1977) (state-initiated civil action to recoup wrongfully-obtained state benefits); Juidice v. Vail, 430 U.S. 327 (1977) (state court contempt proceedings); Huffman v. Pursue, 420 U.S. 592 (1975) (civil nuisance action brought by county officials).

more compelling than in the area of criminal law enforcement. Most recently, in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., No. 85-488 (June 27, 1986), the Court re-emphasized the importance of the abstention doctrine to the proper function of federal and state authority. As petitioners describe, the Court of Appeals has mistakenly declined to abstain from interfering with ongoing state criminal proceedings. If allowed to stand, the Court of Appeals' decision would permit a federal court to enmesh itself in ongoing state criminal proceedings irrespective of the fact that the federal plaintiffs possess a state judicial forum capable of resolving their constitutional claims. Such a decision is contrary to the important

policies the abstention doctrine was designed to promote. For these reasons, this Court's review is warranted.

1. a. As related by the opinion of Judge Adams, the state grand jury investigation of respondents and their activities had been proceeding throughout the period of time before and after the filing of this lawsuit under 42 U.S.C. § 1983. Pet. App. 34a-37a. The state court assigned to supervise the grand jury and which had issued the search warrant specifically stated there was an ongoing state grand jury proceeding which was a criminal investigation of alleged violations of state criminal statutes. By the time the District Court here issued its decision



abstaining from consideration of respondents' civil rights claim, the parties had appeared twice before the state court and were involved in proceedings related to the validity of the state court issued search warrant. (Pet. 6-7).

The majority opinion authored by Judge Gibbons, however, sought to distinguish between state proceedings commenced before the filing of a federal complaint and those which might be contemplated after the filing of the federal complaint. The majority's decision on this point failed to discuss or even cite this Court's opinion in Ohio Civil Rights Commission, supra. There, the Court stated that state court proceedings occurring after the filing of a federal complaint may not be ignored by a federal court called upon

to decide the abstention question. Slip op. at n.2. See also Hicks v. Miranda, 422 U.S. 332, 349 (1975). Thus, the majority's conclusion that there were no ongoing state criminal proceedings involving the parties is simply erroneous.<sup>2</sup>

b. Recognizing the significance of state criminal proceedings, the Court has stressed that a federal court should not often interfere with those proceedings. Younger, supra, 401 U.S.

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<sup>2</sup>We also note that, subsequent to the Court of Appeals' decision, indictments were returned against some of the respondents. Pet. 8 n.2. These later developments, which may be considered by the Court, see Middlesex County Ethics Committee v. Garden State Bar Assoc., 457 U.S. 423, 436-37 (1982), make it clear that there are pending criminal proceedings adequate for review of respondents' claims.

at 43; Trainor, supra, 431 U.S. at 443; Hoffman, supra, 420 U.S. at 604-05. In Perez v. Ledesma, 401 U.S. 82 (1971), the Court stated that this unwarranted interference can occur even where the federal court is not asked to enjoin the state proceedings themselves. The issue in Perez was whether abstention was appropriate where the state defendants sought an order from the federal court suppressing evidence to be used in the ongoing state proceedings. The state court proceedings here concern the propriety of the use of documents, seized pursuant to a warrant, and intended to be used in an ongoing grand jury proceeding and criminal investigation. Thus, while respondents assert they do not seek to enjoin the criminal investigation or the grand jury proceeding, the state's interest is no less than if they were.

The majority below stated that the question of whether the existence of an ongoing grand jury proceeding qualifies for abstention is a question of first impression in the Third Circuit. It also recognized, however, that other Courts of Appeals have held that a grand jury proceeding does warrant abstention. See Pet. 14-16. Despite this recognition, and the policies abstention is designed to promote, the majority sought to distinguish between cases where the federal plaintiffs have been "charged" by the state and cases, like the present one, where the federal plaintiffs are not yet charged but are subjects of a grand jury investigation. As the dissenting opinion of Judge Adams makes

clear, the state proceedings here "plainly implicate[d] important state interests" even though no charges had been filed against respondents.<sup>3</sup> The state court before whom the parties were appearing expressly stated that there was an ongoing criminal investigation involving allegations of criminal violations which the state grand jury was actively pursuing. Court of Appeals App. 469-24; 474-14. The artificial distinction drawn by the majority between grand jury investigations and charges issued after grand jury investigations makes no sense; the importance of the state's interest is the same regardless.

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<sup>3</sup>As petitioners inform the Court, indictments were returned on September 10, 1986. Pet. 8 n.2.

2. The most critical error of the majority below, however, was its failure to appreciate the effect of available state court remedies on the proper abstention analysis. Here, again, the opinion by Judge Gibbons fails to follow, or even mention, this Court's decision in Ohio Civil Rights Commission, supra. The majority concluded that, because a state grand jury proceeding is ex parte and does not adjudicate the merits of a constitutional challenge, it does not qualify as a proceeding capable of resolving the federal plaintiffs' constitutional claim. Under Ohio Civil Rights Commission, this conclusion is erroneous.



Whatever may be true about the non-adversarial nature of a grand jury, the fact remains that states do provide judicial forums for the resolution of questions, like here, involving fourth amendment rights.<sup>4</sup> Indeed, as Judge Adams noted, New Jersey law provides for the availability of relief not only to one who has been charged with crime but also to one who has reason to believe that property seized from him may be used as evidence in a penal proceeding. Thus, were the respondents here to avail themselves of this remedy, the state court proceedings necessarily would

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<sup>4</sup>In Pennsylvania, for example, state law provides for a suppression hearing upon motion. Rules 306, 323, Pennsylvania Rules of Criminal Procedure, 42 Pa.C.S. (1986).

constitute an opportunity to raise the same constitutional issues they apparently seek to raise in this case.

Moreover, it is disingenuous to suggest, as the Court of Appeals majority does (Pet. App. 31a-31a), that abstention is inappropriate just because a state judicial proceeding is available. Here the record is clear that a judge who was supervising the grand jury and who issued the search warrant was conducting proceedings designed to assess respondents' claims regarding the search. The judge made it clear that as a part of these ongoing proceedings respondents were free to file, and have adjudicated, a motion raising precisely the same constitutional claims which they were pursuing in federal court.

It is sufficient for abstention purposes if the constitutional claim may be raised in state court review proceedings, even if not the precise proceeding in which the parties first become adversaries. Ohio Civil Rights Commission, supra. There, the Court rejected the argument that, since the state administrative tribunal could not entertain constitutional challenges, the tribunal could not qualify as a proceeding entitled to abstention. Since the constitutional claim could be raised in state court judicial review of the administrative body, however, the Court concluded that there was an adequate opportunity to litigate the constitutional claim. The same is true here. Respondents could present their constitutional claim to a state court under

state law; it is immaterial, therefore, whether they may do so before the grand jury itself.

For these reasons, review by this Court is appropriate.

CONCLUSION

The petition for writ of  
certiorari should be granted.

Respectfully submitted,

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# **JOINT APPENDIX**

5  
No. 86-890

Supreme Court, U.S.  
FILED

MAR 13 1987

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

DEAN DEAKINS, *et al.*,

*Petitioners,*

vs.

WILLIAM MONAGHAN, *et al.*,

*Respondents.*

On Writ Of Certiorari To The United States Court Of  
Appeals For The Third Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 26, 1986  
CERTIORARI GRANTED JANUARY 27, 1987

9992

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# **NOTATION CONCERNING ITEMS WHICH APPEAR IN THE APPENDIX TO THE PETITION FOR CERTIORARI**

The following notices, opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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**DOCKET ENTRIES IN THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF NEW JERSEY**

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES,  
FOUNDATIONS & STRUCTURES, INC., WILLIAM E. MONAGHAN  
ASSOCIATES, and MJD CONSTRUCTION COMPANY, INC.

*Plaintiffs*

DEAN DEAKINS, New Jersey Division of Criminal Justice;  
IRVING DUBOW, New Jersey Division of Criminal Justice;  
ROBERT GRAY, New Jersey Division of Criminal Justice;  
RONALD LEHMAN, New Jersey State Police; ALBERT G.  
PALENTCHAR, New Jersey Division of Criminal Justice;  
DONALD A. PANFILE, New Jersey Department of Treasury;  
WALTER PRICE, New Jersey Division of Criminal Justice;  
WILLIAM SOUTHWICK, New Jersey Division of Criminal Jus-  
tice; RONALD SOST, New Jersey Division of Criminal Jus-  
tice; JOHN DOE, an individual co-ordinating a search of  
the premises of Foundations & Structures, Inc.; JOHN DOE,  
an individual supervising investigators in the New Jersey  
Division of Criminal Justice; and JOHN DOE, an individual  
training investigators in the New Jersey Division of Crim-  
inal Justice

*Defendants*

**CAUSE**

**(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE  
CASE IS FILED AND WRITE A BRIEF STATEMENT OF  
THE CAUSE)**

CIVIL RIGHTS—42 USC 1983—illegal search and seizure

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201-642-3900

## FILING OR PROCEEDING

Date		
1-3-85	1	Complaint and <i>Jury Demand</i> filed, 12-27-84.
1-3-85		Summons issued, 12-28-84.
1-3-85	2	Notice of Allocation and Assignment filed, 12-27-84. (Camden-Brotman)
1/29/85	3	Notice of objections pertaining to irregularities in pltfs.' notices for taking depositions, filed 1/22/85.
2/1/85	4	Notice of motion by defts. for an Order of Dismissal, filed 1/28/85. (Brief) (Ret. 3/1/85)
2/1/85	5	Affidavit of Julian Wilsey, filed 1/28/85.
2/1/85	6	Affidavit of Dean Deakins, filed 1/28/85.
2/1/85	7	Affidavit of mailing by Phyllis I. Persicketti, filed 1/28/85.
2/1/85	8	Order for Scheduling Conference on 4/9/85, filed. (Simandle) Notice mailed.
2/6/85	9	Summons returned with proof of service showing service upon defts. A. Palentchar, D Deakins, W. Price, I. Dubow on 1/8/85; R. Gray, Wm. Southwick, Ronald Sost, R. Lehman & D. Panfile on 1/16/85, filed 2/5/85.
2/20/85	10	Notice of cross-motion by pltfs. for an Order denying defts.' motion to dismiss, etc., filed 2/15/85. (Brief) (Ret. 3/15/85)
2/20/85	11	Affidavit of Wm. E. Monaghan, filed 2/15/85.
2/20/85	12	Affidavit of Frederick Essel, filed 2/15/85.
2/20/85	13	Affidavit of Patrick T. McGahn, Jr., filed 2/15/85.
2/20/85	14	Affidavit of Sharon Donofrio, filed 2/15/85.
2/20/85	15	Affidavit of J. Dennis Cogan, filed 2/15/85.
2/20/85	16	Notice of Request for Oral Argument on motion ret. 3/15/85 on behalf of defts., filed 2/19/85.
2/20/85	17	Affidavit of Denise L. Zelenak, filed 2/19/85.

3/4/85	18	Affidavit of Julian Wilsey, filed 3/1/85.
3/4/85	19	Affidavit of Service by Valerie V. Ferrara, filed 3/1/85.
3/6/85	20	Affidavit of Kathy M. Hooke, filed 3/5/85.
4/8/85		Hearing on Motion by Defts. for an Order of Dismissal
		Hearing on Motion by Pltfs. for return of certain documents
		DECISION RESERVED
3/26/85	21	Order staying depositions previously noticed & State of NJ Div. of Crim. Justice shall not unseal documents sealed by consent of counsel pending decision, filed 3/25/85. (Brotman) Notice mailed.
8-8-85	22	Opinion filed, 8-6-85. (Brotman)
8-8-85	23	Order granting Defendants' Motion to dismiss Complaint filed, 8-6-85. (Brotman)
9-6-85	24	Notice of Appeal by Plaintiffs, filed 9-4-85. (Notice to Clerk, USCA & all counsel)
9-6-85		Transcript Purchase Order issued to Mr. Fitzpatrick, Esq.
9-16-85	25	Copy of Transcript Purchase Order requesting transcript of hearing of 3-8-85 filed.
10-9-85	26	Transcript of Proceedings of March 8, 1985, filed 10-7-85.
10-9-85		RECORD COMPLETE FOR PURPOSES OF APPEAL. (Notice to Clerk, USCA)
10-15-85	27	Notice of Motion by Plaintiffs for the Reinstatement of a Prior Injunction pending Appeal, filed 10-7-85, (returnable 11-1-85) (Memorandum)(Notice mailed)
10-15-85	28	Affidavit of Kathy M. Hooke, Esq., filed 10-7-85.



**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

**DOCKET No. 85-5589**

**CALENDARED FOR: 4-17-86 P2**

ORIGIN:	<u>NJ-CAMDEN</u>	DOCKETED: 9-11-85
DC DOCKET NO.	<u>CIVIL-84-5369</u>	<input checked="" type="checkbox"/> Fee Paid <input type="checkbox"/> IFP <input type="checkbox"/> CJA <input type="checkbox"/> USA
DC JUDGE	<u>STANLEY S. BROTMAN</u>	<input type="checkbox"/> CPC Granted _____
FILED IN DC	<u>12-26-84</u>	
NOA FILED	<u>9-4-85</u>	DISCLOSURE Applt./Pet. <u>see be-</u> <u>low</u>
CASE TYPE	<u>CIVIL-CIVIL RIGHTS</u>	STATEMENT Appee./Resp. <u>N/</u> <u>A</u>

42 USC 1983-illegal search & seizure

**TITLE OF CASE**

WILLIAM MONAGHAN, THEODORE DESANTIS,  
JOHN JAMES, FOUNDATIONS & STRUCTURES, INC.  
WILLIAM E. MONAGHAN ASSOCIATES, AND  
MJD CONSTRUCTION COMPANY, INC.,

*Appellants*

vs.

DEAN DEAKINS, New Jersey Division of Criminal Justice;  
IRVING DUBROW, New Jersey Division of Criminal Justice;  
ROBERT GRAY, New Jersey Division of Criminal Justice;  
RONALD LEHMAN, New Jersey State Police; ALBERT G.  
PALENTCHAR, New Jersey Division of Criminal Justice;  
DONALD A. PANFILE, New Jersey Department of Treasury;  
WALTER PRICE, New Jersey Division of Criminal Justice;  
WILLIAM SOUTHWICK, New Jersey Division of Criminal Jus-  
tice; RONALD SOST, New Jersey Division of Criminal Jus-

tice; JOHN DOE, an individual co-ordinating a search of the premises of Foundations & Structures, Inc. JOHN DOE, and individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice

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☐ SEE REVERSE FOR CONTINUATION OF CAPTION/APPEARANCES.

NO. 85-5589

RECORD, EXHIBITS & BRIEF INFORMATION/Filing:10-18-85 Partial Rec. or *Cert. List*Record on Appeal ☐ IMPOUNDED

Covers # \_\_\_\_\_

Transcript ordered-S Dener

10-7-85 Transcript filed in DC:

1st Supp. Record

2nd Supp. Record \_\_\_\_\_

Exhibits ☐ REC. RM. ☐ SAFE

Administrative Transcript

10-18-85 Briefing Notice Issued \_\_\_\_\_ CL10/18 Covers #

11-27-85 Brief for Applt. M.S. 11-27-85 (IOCC)

1-3-86 Brief for Appee. M.S. 1-3-86 (IOCC)

Brief for Appee. \_\_\_\_\_

Brief for Appee. \_\_\_\_\_

1-17-86 Reply B. for Applt. M.S. 1-17-86 (IOCC)

Briefs only—copy in motion box

Brief for Applt./

Cross Appee. \_\_\_\_\_

B. for Appee \_\_\_\_\_

Cross Applt./

Reply B. for Applt./

Cross Appee. \_\_\_\_\_

Reply B. for Appee./

Cross Applt. \_\_\_\_\_

EXTENSION Flg. Motion for: | Ord. Fld. | Ext. to:

Record List

Transcripts

Applt's. Brief

Appee's. Brief

Appee's. Brief

Appee's. Brief

(Aplts.)

1-28-86 Supp. "Record"

see p.

2

Reply Brief

## RECORD &amp; BRIEF INFORMATION (Cont.):

Brief for Amicus \_\_\_\_\_

Brief for Intervenor \_\_\_\_\_

Appendix 11-27-85 \_\_\_\_\_ (2 vol.) (4CC)

Appee. Appendix \_\_\_\_\_

Supp. Appendix \_\_\_\_\_

## SUMMARY OF EVENTS

DISMISSALS: Rule 28 [ ] \_\_\_\_\_ Rule 42(b) \_\_\_\_\_

ARGUED/SUBMITTED 4/17/86

PANEL Adams, Gibbons and Stapelton, C.J.

REARGUED \_\_\_\_\_

JUDGMENT-ORDER \_\_\_\_\_

OPINION 7/31/86 ☐ Mem. Op. ☒ Signed ☐ P.C.N/

P or Pub.

MO Gibbons CO neurring in part & dissenting in part

By Judge Adams

## JUDGMENT

Reversing, etc. affirming, etc. Remanding to the said  
d.c. for further proceedings. (ch)

PET. FOR REHG. 8/14/86 of Appellees(ch)

☒ Denied ☐ Granted ☒ In Banc ☐ Panel

8/29/86. (See Page two for ad'l docket entries)(ch)

MANDATE STAYED TO: 12/3/86 (ch)

MANDATE ISSUED

RECORD RETURNED

BILL OF COSTS

CERTIORARI FILED 11-26-86

☐ Denied ☒ Granted

1/27/87 S.C. # 86-890

Reported at 798 F2d 632

(1986)

CONTINUATION (CAPTION/APPEARANCES):

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

DOCKET NO. 85-5589

PAGE TWO

DATE	FILINGS—PROCEEDINGS
Dec. 27	Motion by appellees for an XT until 1/16/86 _within which to file brief, w/svc, filed. (dt)
Dec. 27	Order (Clerk) denying above motion. It is noted that this motion was not filed in a timely manner, well in advance of the filing deadline to be extended. The appellees shall file and serve their brief on or before 1/3/ 86, filed. (dt)
1986	
Jan. 21	Motion by appt to supplement the record to include affidavit of Edward N. Fitzpa- trick (attached), filed. (ad) Send to Merits Panel
Jan. 23	Order (Clerk) referring above motion to mer- its panel, the affidavit will be rec'd. for info. of Ct. and not filed unless Ct. or- ders otherwise, filed. (ad) Send to Merits Panel
Jan. 27	Statement by appellees in lieu of brief in re- sponse to appts' motion dated 1-17-86 (to supplement the record), filed.(ad) Send to Merits Panel
Jan. 28	Motion by appts for leave to supplement the record, filed. (ad) Send to Merits Panel
Jan. 29	Order (Acting Clerk) referring above motion to merits panel, filed. (ad) Send to Merits Panel



Apr. 17 Order (*Adams, Gibbons, Garth, C.J.*) granting  
appls' mot. to supplement record, filed. (ad)

Apr. 17 Order (*Adams, Gibbons, Garth, C.J.*) granting  
appls' mot. to supplement the record to  
include affidavit of Fitzpatrick, filed. (ad)

Aug. 29 Order (*Aldisert, Chief Judge, Seitz, Adams,*  
*Gibbons, Weis Higginbotham, Sloviter,*  
*Becker, Stapleton and Mansmann, Cir-*  
*cuit Judges*) Denying petition for rehear-  
ing, Judges Seitz and Becker would  
Grant appellees' petition for rehearing.  
together with separate statement sur  
denial of petition for rehearing by Judge  
Adams, filed. (ch)

Sept. 4 Corrected Order (*Aldisert, Ch. J., Seitz, Ad-*  
*ams, Gibbons, Weis, Higginbotham, Slov-*  
*iter, Becker, Stapleton and Mansmann,*  
*Circuit Judges*) Denying petition for re-  
hearing. Judges Seitz, Weis, and Becker  
would grant appellees' petition for re-  
hearing. together with separate state-  
ment sur denial of petition for rehearing  
by Judge Adams, filed. (ch)

Sept. 12 Motion by Appellees for stay of the mandate  
to and including December 3, 1986, filed.  
w/service (ch)

Sept. 23 Order (*Gibbons, CJ*) Staying the issuance of  
the mandate to and including December  
3, 1986, filed. (ch)

Dec. 8 Certificate of docketing on November 26, 1986  
of petition for writ of certiorari, rec'd  
from C of S.C., filed. (S.C. #86-890) (jas)

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

Civil Action No.:

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WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES,  
FOUNDATIONS & STRUCTURES, INC., WILLIAM E. MONAGHAN  
ASSOCIATES, and MJD CONSTRUCTION COMPANY, INC.  
Plaintiffs,

vs.

DEAN DEAKINS, New Jersey Division of Criminal Justice;  
IRVING DUBOW, New Jersey Division of Criminal Justice;  
ROBERT GRAY, New Jersey Division of Criminal Justice;  
RONALD LEHMAN, New Jersey State Police; ALBERT G.  
PALENTCHAR, New Jersey Division of Criminal Justice;  
DONALD A. PANFILE, New Jersey Department of Treasury;

WALTER PRICE, New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundations & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice,

*Defendants.*

### COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs, William Monaghan, Theodore DeSantis, John James, Foundations & Structures, Inc. ("F. & S."), William E. Monaghan Associates ("Monaghan Associates"), and MJD construction Company, Inc. ("MJD"), say:

1. This is a civil action arising under the United States Constitution, particularly under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution; under federal law, particularly the Civil Rights Act of 1964, Title 42 of the United States Code, Section 1983; and under the laws of the State of New Jersey.
2. The court has jurisdiction over this action pursuant to 28 U.S.C. 1343 and principles of pendent jurisdiction.
3. The jurisdiction of the court is further invoked pursuant to 28 U.S.C. § 1331.
4. Venue is proper pursuant to 28 U.S.C. § 1391(b).
5. Plaintiff William Monaghan is a citizen of the United States of America and a resident of Seaville in the Township of Upper, Cape May County, State of New Jersey. Mr. Monaghan is a part owner of F. & S., Monaghan Associates and MJD.
6. Plaintiff Theodore DeSantis is a citizen of the United States of America and a resident of the Borough of Wood-

bine, County of Cape May, State of New Jersey. Mr. DeSantis is a part owner of F. & S., Monaghan Associates and MJD.

7. Plaintiff John James is a citizen of the United States of America and a resident of Somers Point, County of Atlantic, State of New Jersey. Mr. James is a part owner of F. & S., Monaghan Associates and MJD.

8. Plaintiff F. & S. is a New Jersey corporation with its principal place of business at Route 49, Tuckahoe, New Jersey.

9. Plaintiff William E. Monaghan Associates ("Monaghan Associates") is a New Jersey general partnership with offices located at Route 49, Tuckahoe, New Jersey.

10. Plaintiff MJD Construction Company, Inc. ("MJD") is a New Jersey corporation with offices located at Route 49, Tuckahoe, New Jersey.

11. Defendants Dean Deakins, Irving DuBow, Robert Gray, Albert Palentchar, Walter Price, Ronald Sost, William Southwick are now, and at all times material hereto were, duly appointed, employed and acting investigators of the State of New Jersey Division of Criminal Justice.

12. Defendant Donald A. Panfile is now, and at all times material hereto was, a duly appointed, employed and acting investigator of the State of New Jersey Department of Treasury.

13. Defendant Ronald Lehman is, and at all times material hereto, was, a duly appointed, employed and acting investigator of the New Jersey State Police.

14. Defendant John Doe, an individual coordinating a search of the premises of F. & S. on October 5, 1984, is, and at all times material hereto, was duly appointed, employed and acting as an investigator, or in a related capacity with, the New Jersey Division of Criminal Justice, or other division or agency of the State of New Jersey.



15. Defendant John Doe, an individual supervising investigators in the New Jersey Division of Criminal Justice, is, and at all times material hereto was, duly appointed, employed and acting as a supervisor of investigative personnel within the New Jersey Division of Criminal Justice.

16. Defendant John Doe, an individual training investigators in the New Jersey Division of Criminal Justice, is, and at all times material hereto was, duly appointed, employed and acting as a trainer of investigators in the New Jersey Division of Criminal Justice.

17. At all times material to this Complaint, except as expressly set forth in Counts IV, V, VI and VIII, all defendants acted toward plaintiffs under color of the laws of the State of New Jersey and under color of the regulations, customs and practices of the New Jersey Division of Criminal Justice, the New Jersey Department of the Treasury, the New Jersey State Police, or similar state agency.

18. Plaintiffs sue all defendants in their individual capacities.

### COUNT I

1. Plaintiffs incorporate Paragraphs 1-18 as if set forth fully herein.

2. On October 5, 1984, plaintiff William Monaghan was awakened at approximately 7:00 a.m. at his home by defendants Dean Deakins and Ronald Sost who identified themselves to Mr. Monaghan as investigators for the New Jersey Division of Criminal Justice. Mr. Monaghan has a serious diabetic condition; he follows a strict morning routine which was completely upset by defendants' early arrival. Defendants gave no explanation or apology for the earliness of their call. Defendants' early arrival and insistence on a special "private" place to talk also upset the normal routine of other household members, causing dis-

stress to them and to Mr. Monaghan. Defendants Deakins and Sost sought to interview Mr. Monaghan and to gain his cooperation as a witness in connection with certain investigations being conducted in Cape May County. Mr. Monaghan had previously testified before a Grand Jury on related matters and had retained counsel as defendants Deakins and Sost knew. He stated that his attorney had instructed him not to answer questions about these matters except with the attorney present and called his attorney. After agreeing with the request of Mr. Monaghan's attorney not to interview Mr. Monaghan further until meeting at 12:30 p.m. that day, defendants Deakins and Sost continued to pressure Mr. Monaghan concerning certain construction projects in Cape May County, threatening to make him and his construction companies the focus of further criminal investigations and possible prosecutions and otherwise attempting to coerce certain statements from Mr. Monaghan.

3. After leaving the home of plaintiff Monaghan early on the morning of October 5, 1984, defendants Deakins and Sost were seen to communicate with unknown individuals on a walkie-talkie.

4. On or about 7:30 a.m. on the morning of October 5, 1984, two of the defendants arrived at the home of Theodore DeSantis in Woodbine, New Jersey. Mr. DeSantis was not home. Defendants used their vehicle to block Mr. DeSantis' driveway until Mr. DeSantis' son told them that Mr. DeSantis was at a job location in Sea Isle City. Two of the defendants approached Mr. DeSantis shortly thereafter on location in Sea Isle City, and addressed plaintiff DeSantis in a threatening and coercive manner concerning his acting as a witness in certain investigations which were ongoing in Cape May County. Mr. DeSantis had also previously testified before the Grand Jury and had retained counsel which defendants knew. When Mr. DeSantis told defendants that he refused to discuss the matter without consulting with counsel, said defendants left. Defendants



Deakins and Palentchar returned at about 9:15 a.m., stating that plaintiff DeSantis had to make an immediate decision and otherwise harassing and attempting to coerce Mr. DeSantis, despite Mr. DeSantis' refusal to discuss the matter without counsel present. Defendants Deakins and Palentchar left after Mr. DeSantis engaged in a telephone conversation with his attorney.

5. On or about 9:00 a.m. on the morning of October 5, 1984, defendants William Southwick, Donald A. Panfile, Irving Dubow, Ronald Lehman, Walter Price, and Robert Gray appeared at the premises of F. & S. in Tuckahoe, New Jersey and gained access to those premises by presenting to plaintiff John James a search warrant issued on October 4, 1984 by a judge of the Superior Court of New Jersey, Law Division, Mercer County, attached hereto as Exhibit A. Defendants Deakins, Palentchar and Sost arrived subsequently and also gained access to the premises under authority of said search warrant.

6. Said warrant did not authorize the arrest of any individuals and did not state that the items subject to search were contraband or instrumentalities of a crime. Plaintiffs Monaghan, James and DeSantis have done business at the Route 49, Tuckahoe location for approximately 20 years.

7. The above named defendants, who remained on the property of F. & S. for approximately eight hours purporting at all times to act pursuant to the authority of the aforesaid warrant, proceeded to conduct a general and illegal search of the premises of F. & S. beyond the scope of the warrant in that:

(a) All files, boxes, desks, drawers, briefcases and receptacles within the office area of F. & S. were illegally searched although defendants were informed almost immediately how files were organized and were given an index so that files and records listed on the warrant could be located quickly.

(b) Numerous unauthorized photographs were taken of the exterior and interiors of the office area, the entire F. & S. property which consists of several acres, the exterior and interior of repair and maintenance buildings, and of construction machinery and vehicles no matter where located on the property.

(c) All persons present on the premises, including non-employees of F. & S., were required to enter the main office and were illegally detained until each presented identification.

(d) The entrance to the property of F. & S. was barricaded for the entire day by placing one of defendants' vehicles across the open gate and vehicles which attempted to leave were illegally searched.

(e) Serial numbers of construction machinery and vehicles located on the property and in out-buildings were illegally recorded.

(f) Hundreds of documents outside the scope of the warrant were taken away by defendants, including (a) personal papers of the individual plaintiffs; (b) financial records and other documents belonging to Monaghan Associates and MJD; (c) papers containing privileged communications between all of the plaintiffs and their attorneys. Many of these documents are essential to the conduct of the ongoing business of F. & S., Monaghan Associates and MJD.

8. While the search was progressing, plaintiff Monaghan was served with three Grand Jury *subpoenae duces tecum*, all issued on October 4, 1984, the day before the search. The first two *subpoenae*, attached to this Complaint as Exhibits B and C respectively, list as documents to be produced essentially the same documents listed on the war-

rant, demonstrating the unreasonable, unnecessary and pretextual nature of the search conducted on October 5, 1984.

9. The third *subpoena*, attached hereto as Exhibit D, contained a handprinted list of documents to be produced. The four file folders listed on the third subpoena were removed from F. & S. file cabinets by one or more of the defendants, taken into the defendants' possession and then returned to Mr. Monaghan together with the filled in *subpoena*. Mr. Monaghan was then told by one of the defendants that the folders were not within the scope of the warrant and that he was to produce them before the Grand Jury on the date listed. The signature on the third *subpoena* is that of a Deputy Attorney General who was at no time present during the search. The unlawful and unreasonable nature of the search is shown by the fact that the defendants intended to conduct a search for documents outside the scope of the warrant and brought a blank *subpoena* with them for that purpose.

10. Said search was further illegally conducted in that all or some of the aforesaid defendants conducted themselves rudely and arrogantly, refusing, *inter alia*, to allow certain outsiders access to telephones and initially refusing to identify themselves, and without consent or authority making unrestrained use of F. & S. telephones. One or more of the defendants also made statements intended to be overheard by plaintiffs that if defendants did not find what they were looking for at the offices of F. & S., defendants would "tear the house or houses apart" or words to a similar effect.

11. Said search was further illegally conducted in that plaintiffs were not given a complete and proper return and inventory as is required under the laws of the State of New Jersey.

12. The above actions of the defendants were assisted and aided by defendant John Doe, an individual coordi-

nating said search, with whom defendants communicated before, after and during said search.

13. All of the above actions of the named defendants and of defendant John Doe were in violation of plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution and plaintiffs were injured thereby. In particular and without limitation, the early morning arousal of Mr. Monaghan, the subsequent harassment and attempted coercion by defendants, the extreme nature of the search and the arrogant and deliberately intimidating manner in which it was conducted resulted plaintiff Monaghan's incurring a serious insulin reaction on the afternoon of October 5th, causing him great physical and emotional distress. Further, and without limitation, Mr. DeSantis has a serious heart condition, for which he takes medication and undergoes nitroglycerin treatments. He is under a doctor's care and must avoid emotional stress. The aforementioned unlawful acts of the defendants caused Mr. DeSantis great emotional stress, posing great risk to his health and well-being. Further, and without limitation, Mr. James is severely afflicted with rheumatoid arthritis which is aggravated by emotional stress, and has other health problems. Mr. James is also under a doctor's care. The aforementioned unlawful acts of defendants caused Mr. James great emotional distress, further aggravating his arthritic condition and impairing his health.

14. All of the foregoing acts by defendants were done intentionally and maliciously or with reckless and wanton disregard for plaintiffs' constitutional rights.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD demand judgment against Defendants Dean Deakins, Irving Dubow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William South-



wick, Ronald Sost, and John Doe, an individual co-ordinating the aforesaid search, jointly and severally, for:

- (a) Compensatory damages;
- (b) Punitive damages;
- (c) Preliminary injunction requiring the return of all documents seized by the Defendants outside the scope of the warrant and all privileged documents;
- (d) Permanent injunction requiring the return of all documents seized by Defendants;
- (e) Preliminary and permanent injunctions enjoining future unreasonable searches and seizures; and
- (f) Such other relief as the Court deems just, including costs of suit and attorneys fees.

## COUNT II

1. Plaintiffs incorporate Paragraphs 1-18 and Paragraphs 1-14 of Count I as is set forth fully herein.

2. During the illegally conducted search of the premises of F. & S., Inc., one or more of the defendants made statements to Mr. Monaghan and Mr. DeSantis to the effect that any information which plaintiffs Monaghan and DeSantis might give at that time would be considered voluntary.

3. The illegally conducted search of the premises of F. & S. by defendants was initiated after plaintiffs Monaghan and DeSantis refused to speak with certain of the defendants without the presence of counsel, and was intended to harass, intimidate and coerce plaintiffs Monaghan and DeSantis into giving their cooperation with defendants' investigation.

4. Defendant John Doe, an individual co-ordinating the search of F. & S. premises, aided and assisted in the illegal use of the aforesaid search warrant as a tool to coerce and intimidate plaintiffs Monaghan and DeSantis.

5. All of the above actions of defendants were in violation of plaintiffs Monaghan and DeSantis' rights to liberty and due process under the Fifth and Fourteenth Amendments and plaintiffs Monaghan and DeSantis were injured thereby.

6. The aforesaid actions of defendants were also in violation of the rights of all of the plaintiffs under the Fourth and Fourteenth Amendment in that the search of F. & S. premises under color of the warrant and the seizure of documents within and without the scope of the warrant was unlawfully motivated.

7. All of the foregoing acts by defendants were done maliciously and intentionally or with wanton and reckless disregard of the rights of the plaintiffs under the United States Constitution.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD demand judgment against Defendants Dean Deakins, Irving Dubow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual co-ordinating and assisting the aforesaid search, jointly and severally, for:

- (a) Compensatory damages;
- (b) Punitive damages;
- (c) Permanent and preliminary injunction requiring the return of all documents seized by Defendants;
- (d) Preliminary and permanent injunctions against future use of warrants for purposes of intimidation and coercion; and



- (e) Such other relief as the Court deems just, including costs of suit and attorneys fees.

### COUNT III

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, and Paragraphs 1-7 of Count II as if fully set forth herein.

2. After plaintiffs DeSantis and Monaghan stated that they did not wish to discuss certain matters without counsel being present and after agreeing with counsel that further discussions would not take place, defendants (1) continued to pressure and coerce plaintiffs Monaghan and DeSantis without counsel being present; (2) attempted to use the execution of a search warrant to elicit communications from plaintiffs Monaghan and DeSantis without counsel being present; (3) seized numerous privileged communications between and among all plaintiffs and their attorneys and numerous privileged communications which were outside the scope of the warrant and otherwise deprived plaintiffs of rights, privileges and immunities secured to them by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and plaintiffs Monaghan and DeSantis were injured thereby.

3. Defendant John Doe, an individual co-ordinating the search of F. & S. premises, aided and assisted in the foregoing violations of plaintiffs' constitutional rights.

4. All of the foregoing acts by defendants were done maliciously and willfully or with wanton and reckless disregard of plaintiffs' constitutional rights.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD demand judgment against Defendants Dean Deakins, Irving Dubow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual co-ordinating the aforesaid search, jointly and severally, for:

- (a) Compensatory damages;
- (b) Punitive damages;
- (c) Preliminary injunctions requiring the return of all privileged documents;
- (d) Preliminary and permanent injunction enjoining future seizure of privileged materials and interference with plaintiffs' right to counsel; and
- (e) Such other relief as the Court deems just, including costs of suit and attorneys fees.

### COUNT IV

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, and Paragraphs 1-4 of Count III as if fully set forth herein.

2. The property located at Route 49 in Tuckahoe, New Jersey which was entered by defendants Sost, Deakins, Dubow, Gray, Lehman, Palentchar, Panfile, Price and Southwick was, and is lawfully owned by plaintiffs F. & S. and Monaghan Associates. Although said defendants entered upon said property under color of state law, their actions thereafter exceeded the scope of the privilege conferred by the warrant and they committed a trespass *ab initio* on said premises in violation of the rights of plaintiffs F. & S. and Monaghan Associates and plaintiffs F. & S. and Monaghan Associates were injured thereby. Defendants also committed a trespass *ab initio* against personal property owned by each of the plaintiffs in seizing documents outside the scope of the warrant and all plaintiffs were injured thereby.

3. All of the aforementioned acts of the named defendants were done maliciously and willfully and in reckless and wanton disregard of rights secured to plaintiffs under the common law of the State of New Jersey.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD demand judgment against Defendants Dean Deakins, Irving Dubow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, jointly and severally, for:

- (a.) Compensatory damages;
- (b) Punitive damages;
- (c) Preliminary and permanent injunctions requiring the return of all documents seized by Defendants;
- (d) Preliminary and permanent injunction enjoining future unlawful trespasses on plaintiffs' property and against plaintiffs' personal property; and
- (e) Such other relief as the Court deems just, including costs of suit and attorneys fees.

#### COUNT V

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, Paragraphs 1-4 of Count III, and Paragraphs 1-3 of Count IV as if fully set forth herein.

2. Although defendants Sost, Deakins, Dubow, Gray, Lehman, Palentchar, Panfile, Price and Southwick entered upon the property of F. & S. and seized documents, books and records belonging to all of the plaintiffs under color of state law, their actions exceeded the authority conferred upon them by that state law. Said defendants wrongfully converted the property of the plaintiffs and plaintiffs were injured thereby.

3. Defendant John Doe, an individual co-ordinating the search of the premises of F. & S., aided and assisted in

the wrongful conversion of plaintiffs' property in violation of plaintiffs' rights under the common law of the State of New Jersey and plaintiffs were injured thereby.

4. The aforementioned acts of said defendants were done maliciously and willfully, or with wanton and reckless disregard for the rights secured to the plaintiffs under the common law of the State of New Jersey.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD demand judgment against Defendants Dean Deakins, Irving Dubow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual co-ordinating and assisting the aforesaid search, jointly and severally, for:

- (a) Compensatory damages;
- (b) Punitive damages;
- (c) Preliminary and permanent injunctions requiring the return of all privileged documents and all documents seized by the Defendants outside the scope of the warrant; and
- (d) Such other relief as the Court deems just, including costs of suit and attorneys fees.

#### COUNT VI

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, Paragraphs 1-4 of Count III, Paragraphs 1-3 of Count IV, and Paragraphs 1-4 of Count V as if set forth fully herein.

2. The property upon which the offices of F. & S. are located is enclosed by a wire fence at all points from which access by road is possible. Heavy woods surround the remainder of the property. The single main entrance to the



property is through a gate at the front of the property. Another gate in the fence at the front of the property is normally left closed and was closed on October 5, 1984. At approximately 9:00 a.m. on October 5, 1984, defendants parked a vehicle across the front of the main gate, blocking all access and exit from the F. & S. property from that time until approximately 5:30 p.m.

3. By blocking said gate, defendants intended to confine all persons on the F. & S. property within the boundaries of said property and unlawfully did so confine these persons, including, plaintiff John James and, upon their arrival, plaintiffs Monaghan and DeSantis.

4. Plaintiff John James and, after their arrival, plaintiffs Monaghan and DeSantis, were at all time aware of said unlawful confinement and were injured thereby.

5. Defendant John Doe, an individual co-ordinating the search of the premises of F. & S. property, at all times aided and assisted in the unlawful confinement of plaintiffs Monaghan and DeSantis who were injured thereby.

6. The acts of defendants described in this Count VII were done maliciously and willfully and with wanton and reckless disregard for the rights of plaintiffs Monaghan and DeSantis under the common law of the State of New Jersey.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, and John James demand judgment against Defendants Deakins, Irving Dubow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual co-ordinating and assisting the aforesaid search, jointly and severally, for:

(a) Compensatory damages;

(b) Punitive damages; and

(c) Such other relief as the Court deems just, including costs of suit and attorneys fees.

## COUNT VII

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, Paragraphs 1-4 of Count III, Paragraphs 1-3 of Count IV, Paragraphs 1-4 of Count V and Paragraphs 1-6 of Count VI as if fully set forth herein.

2. The actions of defendants in confining plaintiffs Monaghan, DeSantis and James to the property of F. & S. unlawfully deprived them of their liberty without due process in violation of said plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution and plaintiffs were injured thereby.

3. Defendant John Doe, an individual co-ordinating the search of the premises of F. & S. property, aided and assisted in the aforementioned violations of plaintiffs' constitutional rights and plaintiffs were injured thereby.

4. The acts of said defendants described in this Count VIII were done maliciously and willfully or with reckless and wanton disregard of plaintiffs' constitutional rights.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis and John James demand judgment against Defendants Dean Deakins, Irving Dubow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual co-ordinating and assisting the aforesaid search, jointly and severally, for:

(a) Compensatory damages;

(b) Punitive damages; and

(c) Such other relief as the Court deems just, including costs of suit and attorneys fees.



**COUNT VIII**

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, Paragraphs 1-4 of Count III, Paragraphs 1-3 of Count IV, Paragraphs 1-4 of Count V, Paragraphs 1-6 of Count VI and Paragraphs 1-4 of Count VII as if fully set forth herein.

2. The acts of defendants described in the foregoing Counts I-VIII constituted extreme and outrageous conduct intentionally or recklessly causing physical injury and severe emotional distress to plaintiffs Monaghan, DeSantis and James.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis and John James demand judgment against Defendants Dean Deakins, Irving Dubow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual co-ordinating and assisting the aforesaid search, jointly and severally, for:

- (a) Compensatory damages;
- (b) Punitive damages;
- (c) Preliminary and permanent injunctions enjoining defendants from intentionally inflicting emotional distress on plaintiffs Monaghan and DeSantis in the future; and
- (d) Such other relief as the Court deems just, including costs of suit and attorneys fees.

**COUNT IX**

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, Paragraphs 1-4 of Count III, Paragraphs 1-3 of Count IV, Paragraphs 1-4 of Count V, Paragraphs 1-6 of Count VI, Paragraphs 1-4 of Count VII and Paragraphs 1-2 of Count VIII as if fully set forth herein.

2. At all times relevant to this Complaint, Defendants Deakins, Sost, Palentchar, Dubow, Gray, Price, Southwick, investigators with the New Jersey Division of Criminal Justice, were acting under the direction and control of Defendant John Doe, a supervisor of investigators in the New Jersey Division of Criminal Justice.

3. Said defendant John Doe had a duty to instruct, supervise, control and discipline the investigator defendants to execute search warrants and conduct investigations in a manner consistent with plaintiffs' rights under the United States Constitution and under the common laws of the State of New Jersey.

4. Said defendant John Doe, acting under color of state law, negligently, or intentionally and willfully, failed to properly instruct, supervise, control and discipline said defendants.

5. Said defendant John Doe had knowledge or, had he or she diligently exercised his or her duty to instruct, supervise, control and discipline on a continuing basis, should have had knowledge that the wrongs done, as heretofore alleged, were about to be committed. Said defendant John Doe had power to prevent or aid in preventing the commission of said wrongs, could have done so by reasonable diligence, and, acting under color of state law, neglected or intentionally refused to do so.

6. Said defendant John Doe, directly or indirectly, under color of law, approved or ratified the unlawful, deliberate, malicious, reckless and wanton conduct of the defendant members of the New Jersey Division of Criminal Justice.

7. As a direct and proximate result of the acts of said defendant John Doe, more particularly described in Paragraphs 4-6 of this Count IX, plaintiffs have been deprived of their rights and privileges under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Con-

stitution and under the common laws of the State of New Jersey.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD demand judgment against Defendant John Doe, an individual supervising investigators in the New Jersey Division of Criminal Justice, jointly and severally for:

- (a) Compensatory damages;
- (b) Punitive damages;
- (c) Preliminary injunctions requiring the return of all documents seized by the Defendants outside the scope of the warrant and all privileged documents;
- (d) Permanent injunction requiring the return of all documents seized by Defendants; and
- (e) Such other relief as the Court deems just including costs of suit and attorneys fees.

#### COUNT X

1. Plaintiffs repeat Paragraphs 1-18, Paragraphs 1-14 of Count I, Paragraphs 1-7 of Count II, Paragraphs 1-4 of Count III, Paragraphs 1-3 of Count IV, Paragraphs 1-4 of Count V, Paragraphs 1-6 of Count VI, Paragraphs 1-4 of Count VII, Paragraphs 1-2 of Count VIII, and Paragraphs 1-7 of Count IX as if fully set forth herein.

2. Defendant John Doe, an individual training and instructing the defendant investigators in the New Jersey Division of Criminal Justice, had a duty to train and instruct said defendant investigators to execute search warrants and conduct investigations in a manner consistent with plaintiffs' rights under the United States Constitution and under state law.

3. Said defendant John Doe, acting under color of law, negligently or intentionally and willfully failed to properly train and instruct said defendant investigators.

4. As a direct and proximate result of failure described in Paragraph 3 of this Count X, plaintiffs have been deprived of their rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under the common laws of the State of New Jersey.

WHEREFORE, Plaintiffs William Monaghan, Theodore DeSantis, John James, F. & S., Monaghan Associates and MJD demand judgment against Defendants Dean Deakins, Irving Dubow, Robert Gray, Robert Lehman, Albert Palentchar, Donald A. Panfile, Walter Price, William Southwick, Ronald Sost, and John Doe, an individual training and instructing the defendant investigators in the New Jersey Division of Criminal Justice, jointly and severally, for:

- (a) Compensatory damages;
- (b) Punitive damages;
- (c) Preliminary injunctions requiring the return of all documents seized by the Defendants outside the scope of the warrant and the return of all privileged documents;
- (d) Permanent injunction requiring the return of all documents seized by Defendants; and
- (e) Such other relief as the Court deems just, including costs of suit and attorneys fees./

McGAHN, FRISS & MILLER  
1421 Atlantic Avenue  
Atlantic City, New Jersey 08401  
Attorneys for William Monaghan,  
Foundations & Structures,  
William E. Monaghan Associates, and  
MJD Construction Company, Inc.

By: /s/ PATRICK T. MCGAHN, JR.  
Patrick T. McGahn, Jr.

CLAPP & EISENBERG  
A Professional Corporation  
80 Park Plaza  
Newark, New Jersey 07102  
Attorneys for Theodore DeSantis  
and Co-Counsel for  
Foundations & Structures, Inc.,  
William E. Monaghan Associates  
and MJD Construction Company, Inc.

By: /s/ KATHY M. HOOKE  
Kathy M. Hooke

### DEMAND FOR JURY TRIAL

Plaintiffs William Monaghan, Theodore DeSantis, John James, Foundations & Structures, Inc., William E. Monaghan Associates and MJD Construction Company, Inc. hereby demand a trial by jury with respect to all Counts of the Complaint.

MCGAHN, FRISS & MILLER  
1421 Atlantic Avenue  
Atlantic City, New Jersey 08401  
Attorneys for William Monaghan,  
Foundations & Structures,  
William E. Monaghan Associates, and  
MJD Construction Company, Inc.,

By: /s/ PATRICK T. MCGAHN, JR.  
Patrick T. McGahn, Jr.

CLAPP & EISENBERG  
A Professional Corporation  
80 Park Plaza  
Newark, New Jersey 07102  
Attorneys for Theodore DeSantis  
and Co-Counsel for  
Foundations & Structures, Inc.,  
William E. Monaghan Associates  
and MJD Construction Company, Inc.

By: /s/ KATHY M. HOOKE  
Kathy M. Hooke



## EXHIBIT A

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION—MERCER COUNTY

## SEARCH WARRANT

STATE OF NEW JERSEY       )  
  ss  
COUNTY OF MERCER        )

TO: Any member of the New Jersey State Police, any investigator of the Division of Criminal Justice, State of New Jersey, and any police officer having jurisdiction:

State Investigator Albert G. Palentchar, Division of Criminal Justice, Department of Law and Public Safety, State of New Jersey, having personally appeared before me, a judge of the Superior Court, State of New Jersey, upon application for the issuance of a search warrant on the ground that he has probable cause to believe and does believe that in and upon certain premises located in Tuckahoe, New Jersey, known as the offices of Foundations and Structures, Inc., Route 49, Tuckahoe, New Jersey, and more particularly described as Foundations and Structures, Inc.'s property and buildings are located approximately 1.9 miles west of the Junction of Rt. 49 and Rt. 50 in Tuckahoe, on the south side of Rt. 49. There is a short driveway onto a parking area and entrance to the property with a chain link fence and gate. The Foundations and Structures building on the left side of the gate entrance is a one story white structure with a peaked roof and black trim with a small black sign in the doorway which reads "Foundations & Structures". On the right side of the gate entrance is another one story white block building with a peaked roof and black trim bearing a large sign which reads "E & S General Contractors, Bridges—Piling—Concrete Bulkheads—Pipework—Foundations. Call 927-5383, 4363". There are two other one story side structures to the rear of the first two buildings. These latter three build-

ings appear to be used for storage of construction materials; there has been and is located documentation which constitutes evidence of and tends to show the crimes of theft, falsifying or tampering with records, bribery in violation of *N.J.S.A. 2C:20-1 et seq.*, *N.J.S.A. 2C:21-4a* and *N.J.S.A. 2C:27-2* and conspiracy to commit these crimes in violation of *N.J.S.A. 2C:5-2* and consists of the following evidence for the time period from September 8, 1978 to the present:

- (1) All file material, including but not limited to, contacts, bid documentation, change orders, job meeting minutes, site logs, truck logs, tipping fee records, purchase orders, vendors payments and invoices, disbursements and receivables records and correspondence and memoranda pertaining to the Site Preparation Contract for the Ocean City Waste Water Treatment Plant.
- (2) All file material, including but not limited to, correspondence, memoranda, appraisals, deeds, option agreements, agreements of sale, or other documentation, including notes and calculations pertaining to the F&S and Monaghan Associates properties located in Woodbine, designated as the planned site for the Cape May County Municipal Utilities Sanitary Landfill Site.
- (3) Any and all contracts, subcontracts, billings, payments, correspondence, memoranda, or other records pertaining to work performed by F&S for the City of North Wildwood.
- (4) Cancelled checks and bank statements of all accounts maintained by or on behalf of F&S and Monaghan Associates.
- (5) Cash disbursements journals, check registers, cash receipts journals, payroll journals, and ac-

counts payable and accounts receivable records of F&S and Monaghan Associates.

(6) Telephone message log books and appointment books of F&S and Monaghan Associates.

AND the Court having reviewed the affidavit of Albert G. Palentchar;

AND the Court being satisfied from the foregoing that grounds for granting the application exist;

NOW, THEREFORE, YOU ARE HEREBY COMMANDED to enter, inspect, and search with the necessary and proper assistance, the premises hereinabove named, for the property specified while serving this warrant and making the search and to take into your possession all such property to the end that the same may be dealt with according to law.

YOU ARE FURTHER COMMANDED, in the event that you seize any of the above-described property to give a copy of this warrant together with a receipt for the property so seized to the persons from whom this property is removed, or in the absence of such persons to leave a copy of this warrant, together with such receipt, in or upon the premises from which the said property was taken.

YOU ARE FURTHER COMMANDED, to execute this warrant within ten (10) days from the issuance hereof, between the hours of 9 a.m. and 9 p.m. except Saturday and Sunday, and forthwith make return thereof to me with your inventory of any and all things so seized or removed hereunder by you.

GIVEN AND ISSUED, under my hand at 4:45 o'clock p.m. this 4th day of October, 1984.

/s/ SAMUEL D. LENOX  
SAMUEL D. LENOX, JR., A.J.S.C.

## EXHIBIT B

### Subpoena Duces Tecum

#### Superior Court of New Jersey

State of New Jersey )

)ss

County of Mercer )

TO: Custodian of Records, Foundations & Structures, Inc.  
State Highway 49, Tuckahoe, New Jersey

You are hereby commanded to appear at Richard J. Hughes Justice Complex, 25 Market Street, 4th floor in the City of Trenton on October 19, 1984 at 10:00 a.m. to give evidence before the State Grand Jury and you are ordered to appear without prepayment of witness fee and bring with you the following records: \_\_\_\_\_

See Attached Schedule A

If you fail to appear and produce the said records, a warrant may be issued for your arrest and you may be charged with contempt.

WITNESS the Honorable Samuel D. Lenox, Jr., Judge of the Superior Court, this 4th day of October, 1984.

/s/ JOHN M. MAYSON

John M. Mayson  
Clerk of the Superior Court

/s/ RICHARD R. SHIARELLA

Richard R. Shiarella  
Deputy Attorney General  
(609) 984-5683

Received this subpoena at Trenton on 10-4-84 and on 10-5-84 at Rt. 49 Tuckahoe NJ I served it on the within named Mr. Ted De Santis by delivering a copy to him.

(Date October 5, 1984

/s/ Robert J. Meier

---

Signature and Title

Foundations & Structures, Inc.  
Return Date: 10/19/84

#### SCHEDULE A

1. All file material, including but not limited to, contracts, bid documentation, change orders, job meeting minutes, site logs, trucks logs, tipping fee records, purchase orders, vendors payments and invoices, disbursements and receivables records and correspondence and memoranda pertaining to the Site Preparation Contract for the Ocean City Waste Water Treatment Plant.

2. All file material, including but not limited to, correspondence, memoranda, appraisals, deeds, option agreements, agreements of sale, or other documentation, including notes and calculations pertaining to the F&S property located in Woodbine, designed as the planned site for the Cape May County Municipal Utilities Sanitary Landfull Site.

3. Cancelled checks and bank statements of all accounts maintained by or on behalf of F&S and Monaghan Associates.

4. Cancelled checks and bank statements of all accounts maintained by or on behalf of F&S.

5. Cash disbursements journals, check registers, cash receipts journals, payroll journals, and accounts payable and accounts receivable records of F&S.

6. Telephone message log books and appointment books of F&S.



**EXHIBIT C**

**SUBPOENA DUCES TECUM**

**SUPERIOR COURT OF NEW JERSEY**

State of New Jersey  
County of Mercer

TO: Custodian of Records, Monaghan Associates  
State Highway 49, Tuckahoe, New Jersey

You are hereby commanded to appear at Richard J. Hughes Justice Complex 25 Market Street, 4th floor in the City of Trenton on October 19, 1984 at 10:00 a.m. to give evidence before the State Grand Jury and you are ordered to appear without prepayment of witness fee and bring with you the following records: \_\_\_\_\_

See Attached Schedule A

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If you fail to appear and produce the said records, a warrant may be issued for your arrest and you may be charged with contempt.

WITNESS the Honorable Samuel D. Lenox, Jr., Judge of the Superior Court, this 4th day of October, 1984.

/s/ JOHN M. MAYSON  
JOHN M. MAYSON  
Clerk of the Superior Court

/s/ RICHARD R. SHIARELLA  
RICHARD R. SHIARELLA  
Deputy Attorney General  
(609) 984-5683

Received this subpoena at Trenton on 10-4-84 and on 10-5-84 at Rt. 49 Tuckahoe, NJ I served it on the within named Mr. Ted DeSantis by delivering a copy to him.

(Date October 5, 1984

/s/ ROBERT D. MEIER  
State Investigator

Signature and Title

Monaghan Associates  
Return Date 10/19/84

**SCHEDULE A**

1. All file material, including but not limited to, contracts, bid documentation, change orders, job meeting minutes, site logs, truck logs, tipping fee records, purchase orders, vendors payments and invoices, disbursements and receivables records and correspondence and memoranda pertaining to the Site Preparation Contract for the Ocean City Waste Water Treatment Plant.

2. All file material, including but not limited to, correspondence, memoranda, appraisals, deeds, option agreements, agreements of sale, or other documentation, including notes and calculations pertaining to the Monaghan Associates property located in Woodbine, designated as the planned site for the Cape May County Municipal Utilities Sanitary Landfill Site.

3. Cancelled checks and bank statements of all accounts maintained by or on behalf of Monaghan Associates.

4. Cash disbursements journals, check registers, cash receipts journals, payroll journals, and accounts payable and accounts receivable records of Monaghan Associates.

5. Telephone message log books and appointment books of Monaghan Associates.

**EXHIBIT D****SUBPOENA DUCES TECUM****SUPERIOR COURT OF NEW JERSEY**

State of New Jersey  
County of Mercer

TO: Custodian of Records Foundations and Structures  
Route 49, Tuckahoe, N.J.

You are hereby commanded to appear at Richard J. Hughes Justice Complex 25 Market Street, 4th Floor In the City of Trenton on October 19, 1984 at 10:00 a.m. to give evidence before the State Grand Jury and you are ordered to appear without prepayment of witness fee and bring with you the following records: File Folders: (1) Re: BID Ocean City Sewer Plant-C-448 (1636) (2) Demolition of City Plant & Pump Stations -2-28-83 EST 1631 (3) C-498 Emy Repairs at City Sewer Plant for CMCMUA 9/18/84 (4) C-478 FM Repair Ocean City For CMCMUA 9/11/84

If you fail to appear and produce the said records, a warrant may be issued for your arrest and you may be charged with contempt.

WITNESS the Honorable Samuel D. Lenox, Jr., Judge of the Superior Court, this 4th day of October, 1984.

/s/ JOHN M. MAYSON

JOHN M. MAYSON

Clerk of the Superior Court

/s/ ANTHONY G. SIMONETTI

Deputy Attorney General

Received this subpoena at \_\_\_\_ on \_\_\_\_ and on \_\_\_\_ at \_\_\_\_ I served it on the within named \_\_\_\_ by delivering a copy to \_\_\_\_

(Date \_\_\_\_\_)

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

McGahn, Friss & Miller  
1421 Atlantic Avenue  
Atlantic City, New Jersey 08401  
Attorneys for William Monaghan,  
Foundations & Structures, Inc.,  
and William E. Monaghan  
Associates

Clapp & Eisenberg  
A Professional Corporation  
80 Park Plaza  
Newark, New Jersey 07102  
Attorneys for Theodore DeSantis and Co-Counsel for  
John James, Foundations & Structures, Inc.,

---

**Civil Action No.**

---

WILLIAM MONAGHAN, THEODORE DESANTIS, FOUNDATIONS  
& STRUCTURES, INC., and WILLIAM E. MONAGHAN  
ASSOCIATES,

*Plaintiffs,*

v.

DEAN DEAKINS, New Jersey Division of Criminal Justice;  
IRVING DUBOW, New Jersey Division of Criminal Justice;  
ROBERT GRAY, New Jersey Division of Criminal Justice;  
RONALD LEHMAN, New Jersey State Police; ALBERT G.  
PALANTCHAR, New Jersey Division of Criminal Justice;  
DONALD A. PANFILE, New Jersey Department of Treasury;  
WALTER PRICE, New Jersey Division of Criminal Justice;  
WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice;  
RONALD SOST, New Jersey Division of Criminal Justice;  
JOHN DOE, an individual co-ordinating a search of the

premises of Foundations & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice,

*Defendants.*

**NOTICE TO TAKE  
ORAL DEPOSITIONS**

TO: DEAN DEAKINS  
STATE OF NEW JERSEY  
OFFICE OF THE ATTORNEY GENERAL  
DIVISION OF CRIMINAL JUSTICE  
HUGHES JUSTICE COMPLEX  
CN-085  
TRENTON, NEW JERSEY 08625

SIR:

PLEASE TAKE NOTICE that, in accordance with Rule 30 of the Federal Rules of Civil Procedure, testimony will be taken by deposition upon oral examination before a person authorized by the laws of the State of New Jersey to administer oaths on February 13, 1985, at 9:30 a.m. and continued from day to day until completed, at the offices of Clapp & Eisenberg, a professional corporation, 80 Park Place, Newark, New Jersey, with respect to all matters relevant to the subject matter involved in this action at which time you will produce the following persons whose deposition is to be taken:

DEAN DEAKINS  
New Jersey Division of Criminal Justice

TAKE FURTHER NOTICE that at the same time and place each of the above named persons is hereby requested and required, in accordance with Federal Rules of Civil Procedure 30(b)(5), to produce the documents listed on the attached schedules.



CLAPP & EISENBERG  
A Professional Corporation  
Attorneys for Theodore  
DeSantis and Co-Counsel  
for Foundations &  
Structures, Inc.

Dated: December 20, 1984

By: /s/ Kathy M. Hooke

#### PRELIMINARY DEFINITIONS AND INSTRUCTIONS

1. As used herein, the terms "document" and "writing" includes the original or copy of correspondence, charts, logs, records, sign-in sheets, books, pamphlets, study sheets, xeroxed or mimeographed hand-outs, training manuals or similar training materials, memoranda guidelines, procedures, studies, instructions, class notes, reports or any other writing of any kind or description whatsoever, including original documents and copies where applicable (and any non-identical copy, whether difference from the original because of handwritten notes or underlining on the copy or otherwise).

2. As used herein, the term document or writing shall refer only to documents or writings, used by the deponent or made available to him in his capacity as an investigator with the New Jersey Division of Criminal Justice, State Police, Department of the Treasury or other State agency as relevant.

#### SCHEDULE OF DOCUMENTS

1. All documents which describe, identify or in any manner set forth policies governing, and procedures to be used in conducting, the execution of search warrants.

2. All documents which describe, identify or in any manner set forth policies governing, or procedures to be used in conducting, interrogations of potential witnesses before a Grand Jury and interrogations of potential targets of a Grand Jury investigation.

3. All documents which describe, identify or in any manner discuss the constitutional rights of:

(a) persons subject to a search warrant;

(b) persons considered to be potential witnesses before a Grand Jury; or

(c) persons considered to be potential targets of a Grand Jury investigation.

4. All documents which describe, identify or in any manner set forth the assignments, duties or responsibilities of persons involved in a search of the premises of Foundations & Structures, Inc., Route 49, Tuckahoe, New Jersey, on October 5, 1984.

5. All documents which describe, identify or in any manner set forth the procedures governing the use of, and/or service of, Grand Jury subpoenas.

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

McGahn, Friss & Miller  
1421 Atlantic Avenue  
Atlantic City, New Jersey 08401  
Attorneys for William Monaghan, John  
James, Foundations & Structures, Inc.,  
William E. Monaghan Associates  
and MJD Construction Company, Inc.

Clapp & Eisenberg  
A Professional Corporation  
80 Park Plaza  
Newark, New Jersey 07102  
Attorneys for Theodore DeSantis and  
Co-Counsel for John James, Foundations  
& Structures, Inc., William E. Monaghan  
Associates and MJD Corporation Company,  
Inc.

---

**Civil Action  
No. 84-5369(SSB)**

---

WILLIAM MONAGHAN, THEODORE DESANTIS, *et al.*,  
*Plaintiffs,*

v.

DEAN DEAKINS, New Jersey Division of Criminal Justice;  
*et al.*,  
*Defendants.*

**AFFIDAVIT OF  
WILLIAM E. MONAGHAN**

I, WILLIAM E. MONAGHAN, having been duly sworn,  
depone and say:

1. I am one of the individual plaintiffs in the above-captioned matter and I am a part-owner in the two corporate and partnership plaintiffs. I am fully familiar with the facts and circumstances set forth herein.

2. I make this Affidavit in opposition to defendant's motion to dismiss the Complaint and in support of plaintiffs' motion for the return of documents improperly seized pursuant to a warrant executed at the premises of Foundations & Structures, Inc. ("F & S") on October 5, 1984. The main purpose of this Affidavit is to describe the hardships faced by F & S because of the breadth of the seizure that occurred on October 5th.

3. Defendants took accounts receivables and accounts payable folders, bank records, deposit slips, the F & S general ledger, contract folders, engineering and construction estimates, drawings, surveys, and many other similar categories of documents which are vital to the ongoing business of F & S. There have been countless times since October 5, 1984, that I have spent time looking for a document, only to finally conclude that it had been taken by the State. I know that Fred Essl, our office manager, has had the same experience. Although I describe a few specific examples in the next few paragraphs of this Affidavit, they are really only the tip of the iceberg. I also realize that some of the examples given below are traceable to documents legitimately seized by the State, at least on the face of the warrant. Nevertheless, the burden that has been imposed upon F & S is a cumulative one. The hardship that is traceable to documents that were improperly seized because they were outside the scope of the warrant is made even worse by the fact that we have no choice but to live with the burden of coping with missing documents that were, at least as far as we can tell now, legitimately seized.

4. On November 5, 1984, I had discussions with the Cape May County Municipal Utilities Authority staff re-

garding a proposal to take in 200,000 yards of mud at our landfill located in Woodbine, New Jersey. Preparing for these discussions took me approximately 10 hours longer than it normally would have because the folder containing our cost analysis was taken by the State.

5. On November 26, 1984 I did an estimate on the price of taking certain materials from the City of Philadelphia, Pennsylvania into our Woodbine landfill. Because the State took all of our folders in connection with the Woodbine landfill, it took me approximately 16 hours more than it would have had our normal records been available.

6. On January 6, 1985, I did an estimate concerning the removal of a concrete abutment at Grassy Sound in the City of Wildwood. Because the folder that we keep regarding the use of chemicals to break up similar concrete structures was missing, it took me substantially longer to prepare this estimate than it normally would have.

7. On or about January 7, 1985, I spent time preparing our annual financial statements for INA, our insurance company. I had extreme difficulty estimating such items as gross income and sub-contracting costs because the relevant documents for 1984 had been taken by the State. Particular difficulty was caused by the fact that all of our contract folders for 1984 were taken by the State. These contract folders contain change orders and purchase orders to subcontractors. It is almost impossible to estimate the gross income from a particular contract without these records. Particular difficulty was caused by missing contract folders for contracts with North Wildwood, including the contract for Emergency Sewer Repairs for 11th Street; Emergency Sewer Repairs for the New York and Chestnut Streets; the North Wildwood Rehabilitation Projects; and the North Wildwood Reconstruction Boardwalk project. Because the State has our accounts receivable folders, I was also missing gross receipts for manned and bare equipment rentals as well as receipts for our landfill in



Woodbine. I estimate that I spent nearly two full working days reconstructing the necessary financial information to satisfy our insurer.

8. In addition, since January 1, 1985, I have had to submit annual reports for the two corporate plaintiffs to the Secretary of State for the Secretary of New Jersey. Among the documents taken by the State were the past annual reports for MJD Construction Company, Inc. even though MJD was not mentioned at all on the warrant. I have also lost time looking for alternate sources for such information as dates of last annual meetings and the like.

9. On January 30, 1985, I traveled to Trenton, New Jersey with Howard Drucks, Esq. in order copy documents located in one of the boxes in connection with the condemnation of property owned in Woodbine by the Cape May County Municipal Utilities Authority. At that time, I also copied approximately 58 documents from folders having to do with the Woodbine landfill closure, which is a different piece of property from that which is the subject of condemnation proceedings. As far as I can tell, our Woodbine landfill was not the subject of the warrant; yet our folders involving this property were taken by the State. Although the documents that I copied will help somewhat, I know that I missed some that we have needed in the past and will need in the future.

The foregoing statements made by me are true. If any of the foregoing statements is willfully false, I am aware that I am subject to punishment.

/s/ WILLIAM E. MONAGHAN  
William E. Monaghan

Sworn and subscribed before me on this 14th day of February, 1985.

/s/ CORYN M. MONAGHAN

Notary Public

CORYN M. MONAGHAN

Notary Public of New Jersey

My Commission Expires Oct. 17, 1988

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

McGahn, Friss & Miller  
1421 Atlantic Avenue  
Atlantic City, New Jersey 08401  
Attorneys for William Monaghan, John  
James, Foundations & Structures, Inc.,  
William E. Monaghan Associates  
and MJD Construction Company, Inc.

Clapp & Eisenberg  
A Professional Corporation  
80 Park Plaza  
Newark, New Jersey 07102  
Attorneys for Theodore DeSantis and  
Co-Counsel for John James, Foundations  
& Structures, Inc., William E. Monaghan  
Associates and MJD Construction Company,  
Inc.

---

**Civil Action  
No. 84-5369 (SSB)**

---

WILLIAM MONAGHAN, THEODORE DESANTIS, *et al.*,  
*Plaintiffs,*

v.

DEAN DEAKINS, New Jersey Division of Criminal Justice;  
*et al.*,  
*Defendants.*

**AFFIDAVIT OF  
PATRICK T. MCGAHN**

I, PATRICK T. MCGAHN Jr., being duly sworn, depose  
and say:

1. I am a member of the firm of McGahn, Friss & Miller, a professional corporation, attorneys and co-counsel for plaintiffs in this matter. I am fully familiar with the facts and circumstances set forth herein. I make this affidavit in opposition to defendants' motion to dismiss the Complaint and in support of plaintiffs' motion for a return of documents improperly seized.

3. On the afternoon of October 5, 1984, Edward Fitzpatrick and I arrived on the premises of Foundations & Structure, Inc. in Tuckahoe, New Jersey, during the execution of a search warrant by defendants. When I arrived, defendants were loading boxes of records and documents of Foundations & Structures into their vehicles, with, I was told, far greater speed than they had been moving before Mr. Fitzpatrick and I arrived. It became apparent that defendants had not given Mr. DeSantis and Mr. Monaghan, who were also on the scene, an adequate receipt for any of the materials being taken. I was told by Mr. Fred Essl, office manager for Foundations & Structures, Inc., who had been there all day, that defendants had refused at first to give him any receipt although literally hundreds of documents were being removed. Defendants finally produced as a receipt, an ineligible carbon copy of a very general list which they had made. Attached hereto as Exhibit A are the original carbons which plaintiffs were given.

4. Mr. Fitzpatrick and I insisted that Mr. Monaghan and Mr. James be given a complete receipt in accordance with State law. Because of defendants' refusal to do this, it was necessary to call Judge Lennox who had issued the warrant in question. Mr. Fitzpatrick, defendant Deakins and myself participated in a telephone call with Judge Lennox. Judge Lennox ordered that the boxes of documents being removed be sealed until it could be determined whether receipt given was adequate.

5. On October 31, 1984 and November 2, 1984, Clapp & Eisenberg, our co-counsel, moved to quash two subpoenas as having been improperly issued, one as having been improperly issued in blank, to be filled in during execution of the warrant, the other as being the unlawful fruit of the first. On the return date of these applications before Judge Lennox, the State of New Jersey withdrew both subpoenas. Plaintiffs have initiated no other state court proceedings of any kind in connection with either the warrant executed on October 5, 1984 or any of the other various subpoenas issued by the State of New Jersey to Foundations & Structures, Inc. There simply is no factual basis whatsoever for the State's position that there is some kind of "state proceedings" pending for purposes of abstention.

The foregoing statements made by me are true. I understand that if any of the foregoing statements made by me are willfully false, that I am subject to punishment.

/s/ PATRICK T. MCGAHN  
PATRICK T. MCGAHN

Sworn to before me this  
14 day of February,  
1985.

/s/ LETITIA L. ANDERSEN  
Notary Public

LETITIA L. ANDERSEN  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires February 16 1988

(Exhibit A to this Affidavit Has Been Omitted in Printing)

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION MERCER COUNTY**

**CRIMINAL ACTION  
VERIFIED PETITION**

IRWIN I. KIMMELMAN  
ATTORNEY-GENERAL OF NEW JERSEY  
BY: JULIAN WILSEY  
DEPUTY ATTORNEY GENERAL  
DIVISION OF CRIMINAL JUSTICE  
PROGRAM INTEGRITY SECTION  
P.O. BOX CN 085  
TRENTON, NEW JERSEY 08625  
(609) 984-5683

IN THE MATTER OF  
A SEARCH WARRANT  
DATED OCTOBER 4, 1984

STATE OF NEW JERSEY  
COUNTY OF MERCER

JULIAN WILSEY, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am a Deputy Attorney General of the State of New Jersey assigned to the Division of Criminal Justice, and I am the Chief of the Program Integrity Section. In my capacity as Section Chief, I am familiar with the facts and statements made in this verified petition.

2. October 4, 1984, the Honorable Samuel D. Lenox, Jr. Assignment Judge of the Superior Court, signed a search warrant authorizing members of the New Jersey State Police and State Investigators in the Division of Criminal Justice to search for evidence of various criminal activities



such as theft, bribery and tampering with records, at Foundations and Structures, Inc., Route 49, Tuckahoe, New Jersey. The warrant was based upon a sworn application made by State Investigator Albert G. Palentchar. (A copy of the warrant is attached hereto as Exhibit A and made a part hereof as though fully set forth.)

3. State Investigator Palentchar has advised me that while executing the above-referenced search warrant on October 5, 1984, a file was discovered which State Investigator Palentchar felt came within the purview of the warrant. However, a question about the propriety of its seizure was raised by Supervising State Investigator Dean Deakins since the file was titled, to the best of Supervising State Investigator Deakins' present recollection, "Grand Jury." State Investigator Palentchar consulted, by telephone, with a deputy attorney general assigned to the case. As a result of that conversation, State Investigator Palentchar seized the file in question, had it placed in an envelope and had the envelope sealed. This method was employed so that an application could be made to allow Judge Lenox to review the documents contained in the file and ascertain which documents, if any, were privileged or outside the scope of the warrant.

4. Supervising State Investigator Deakins and State Investigator Palentchar further advised that during the execution of the warrant, Supervising State Investigator Deakins had a conversation with an attorney who was representing William Monaghan and Theodore DeSantis, who are principals in Foundations & Structures, Inc. During this conversation, Supervising State Investigator Deakins was advised that the attorney wanted to be provided with an inventory that required a detailed list of information such as describing each check that was seized including the check number, the check amount, and to whom the check was payable; each letter, along with the date and to whom the letter was addressed, and all other documents with identifying information about that document.

5. According to Supervising State Investigator Deakins, later that afternoon, perhaps as late as 4:00 p.m., as the law enforcement officers who were involved in the search were in the process of placing the seized materials into boxes for loading onto the evidence truck, Edward N. Fitzpatrick, Esq., (of the law firm of Clapp & Eisenberg, Esqs.) and Patrick T. McGahn, Jr., Esq., (of the law firm of McGahn, Friss & Miller, Esqs.) arrived at the premises. Messrs. McGahn and Fitzpatrick examined the inventory, took exception to it, and stated that they would not allow the seized materials to leave without a more detailed inventory. Supervising State Investigator Deakins informed them that he intended to act pursuant to the authority provided to the State under the search warrant and would not allow them to hinder the search. Messrs. McGahn and Fitzpatrick then demanded to speak with a deputy attorney general who was involved in this investigation. Supervising State Investigator Deakins arranged for Mr. Fitzpatrick to speak by telephone with one of the deputy attorneys general involved in this case.

6. Thereafter, according to Supervising State Investigator Deakins, it was agreed to telephone Judge Lenox. A telephone conference call was arranged among Judge Lenox, Messrs. Fitzpatrick and McGahn, and Supervising State Investigator Deakins. Messrs. McGahn and Fitzpatrick complained to Judge Lenox that the inventory which was drawn up was not adequate under New Jersey court rules because it did not provide sufficient detail as to the items which the State intended to seize. Ultimately, Judge Lenox suggested that if the Attorney General's Office was willing to do so, the boxes in which the seized documents and materials were contained be sealed in the presence of the attorneys, and the parties could later appear before Judge Lenox to litigate the question whether the inventory was adequate. Supervising State Investigator Deakins informed Judge Lenox and the attorneys that the State would be willing to agree to this suggestion. The boxes

were then unloaded from the evidence truck and sealed in the presence of Messrs. McGahn and Fitzpatrick. Having been sealed, the boxes were reloaded onto the evidence truck and taken to the Division of Criminal Justice in Trenton, New Jersey, where they were stored in the Division evidence vault.

7. Subsequent to October 4, 1985, I had conversations with Mr. Fitzpatrick and Howard Drucks, Esq., an associate with Mr. McGahn's law firm, relating to the inventory. Pursuant to an agreement reached with the attorneys, on October 23, 1984, William Monaghan, Edward Fitzpatrick, Ms. Sharon R. Donofrio, Esq., an attorney associated with Mr. McGahn's law firm, Mr. Frederick Essl, an employee of Foundations & Structures, Inc., and Elizabeth M. Elder, a certified shorthand reporter, came to the offices of the Division of Criminal Justice to prepare an inventory. The inventory was prepared in a room adjacent to the evidence vault. State Investigator Robert Gray was present while the inventory was being prepared. (Prior to this date, October 12, 1984, to be exact, and in accordance with the Court rules, State Investigator Palentchar filed a return with Judge Lenox, including the inventory which was provided to the subjects of the search on October 5, 1985.) In the course of completing their inventory, the attorneys came across some materials which, in their opinion, were improperly seized. It was their opinion that certain documents were either privileged or exceeded the scope of the warrant. The attorneys initially voiced their objections to Investigator Gray and then to me.

8. An agreement was reached between the State and Mr. Fitzpatrick concerning these disputed documents in that the documents would be sealed, and no one would be permitted to break the seal to examine the documents until such time as we had a judicial resolution of Mr. Fitzpatrick's objections. (The agreement was modified on January 30, 1985 by prior agreement to allow representatives from Foundations and Structures, Inc., access to some docu-

ments which they needed. No one from the State, however, reviewed any of these documents at that time.) It was my understanding that an application would be made on behalf of the subjects of the search to Judge Lenox for a determination of this issue.

9. It is also my understanding that the sealed documents comprise one entire carton (designated as carton number 7) and at least two folders of documents contained in cartons numbered 8 and 9, respectively.

10. As of this date, the subjects of the search have not filed any motion with Judge Lenox concerning the seized material. (Messrs. Monaghan and DeSantis have joined in a suit presently pending in the federal district court wherein the defendants are suing various State employees contending that their civil rights were violated as a result of the search on October 5, 1984. The defendants in that action are seeking, in part, discovery of the State's criminal investigation file.) The failure of the subjects to move before Judge Lenox regarding the documents which are presently sealed has impeded the State's investigative efforts.

WHEREFORE, your petitioner prays that Theodore DeSantis, William Monaghan, Foundations and Structures, Inc., and Monaghan Associates, be ordered to show cause why the documents which are presently sealed should not be unsealed.

/s/ JULIAN WILSEY  
JULIAN WILSEY  
Deputy Attorney General

Sworn to and subscribed before me this 19th day of February, 1985.

/s/ R. R. SHIARELLA  
An Attorney-At-Law of New Jersey

Exhibit A, the search warrant, which was appended to the foregoing Petition, is not set forth at this point in the Joint Appendix, because it has already been made part of the Joint Appendix at JA 36 to 38.

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION—MERCER**

**IN THE MATTER OF  
A SEARCH WARRANT  
DATED OCTOBER 4, 1984**

**ORDER TO SHOW CAUSE**

This matter coming on to be heard through the Verified Petition of Julian Wilsey, Deputy Attorney General, for an Order Unsealing Certain Documents Which Are Presently Sealed, and the Court having considered the Verified Petition submitted in support thereof,

IT IS, on this 19th day of February, 1985, ORDERED that Theodore DeSantis, William Monaghan, Foundations & Structures, Inc., and Monaghan Associates show cause before the Honorable Samuel D. Lenox, Jr., Assignment Judge of Superior Court, at the Mercer County Court House, Trenton, New Jersey, on March 11, 1985, at 10:00 A.M., why the above-described documents should not be unsealed, and

IT IS FURTHER ORDERED that a true copy of this Order to Show Cause and the Verified Petition be served upon Theodore DeSantis, William Monaghan, Foundations & Structures, Inc., and Monaghan Associates by personal service upon an individual specified in R. 4:4-4 at least seven days before the return date hereto.

/s/ SAMUEL D. LENOX, JR.  
SAMUEL D. LENOX, JR., A.J.S.C.



**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION MERCER COUNTY**

IN THE MATTER OF A SEARCH  
WARRANT DATED OCTOBER 4, 1984

**STENOGRAPHIC TRANSCRIPT OF MOTION**

**In Camera Hearing**

Place: Mercer County Courthouse  
Trenton, New Jersey

Date: March 11, 1985

BEFORE:

HONORABLE SAMUEL D. LENOX, JR., A.J.S.C.

*Transcript Ordered By:*

Patrick T. McGahn, Jr., Esq.,  
(Messrs. McGahn, Friss, Gindhart & Miller)

APPEARANCES:

(See inside)

APPEARANCES:

ROBERT B. DONOVAN, Esq.,  
Deputy Attorney General  
and  
ALLAN J. NODES, Esq.,  
Deputy Attorney General  
and  
LARRY ETZWEILER, Esq.,  
Deputy Attorney General  
For the State of New Jersey  
MESSRS. CLAPP & EISENBERG

Attorneys for Theodore DeSantis  
and Co-Counsel for Foundations  
& Structures, Inc., and William  
E. Monaghan Associates  
BY: KATHY M. HOOKE, Esq.

MESSRS. MCGAHN, FRISS & MILLER  
Attorneys for William Monaghan  
and Co-Counsel for Foundations  
& Structures, Inc., and William  
E. Monaghan Associates  
BY: PATRICK T. MCGAHN, JR., Esq.

Sandra L. DeLorenzo, C.S.R., CM  
Official Stenographic Reporter  
Mercer County Courthouse  
Trenton, New Jersey 08650

[Tr. p.3] THE COURT: Ms. Hooke, you seem to be lead  
counsel on the motion.

MS. HOOKE: That's correct, your Honor, for Clapp &  
Eisenberg.

THE COURT: Well, you may proceed. I have the names  
of counsel, I think.

MS. HOOKE: I beg your pardon.

THE COURT: I have the names of counsel, so you may  
proceed.

MS. HOOKE: Fine.

Your Honor, I am with Clapp & Eisenberg. We are  
appearing today on behalf of Theodore DeSantis and Co-  
Counsel for Foundations & Structures, Inc. and William  
E. Monaghan Associates.

Mr. Patrick McGahn is here today from the firm of  
McGahn, Friss & Miller. He is appearing on behalf of  
William E. Monaghan and as Co-Counsel for Foundations

& Structures and William E. Monaghan Associates. I believe Mr. McGahn will have a few words to say in addition. But, he has graciously agreed to let me speak this morning.

Your Honor, the relief we are [Tr. p.4] seeking this morning is to discharge an Order to Show Cause which was entered by this Court on February 19th of this year.

We are also seeking costs and attorneys fees in connection with papers we filed in response and in connection with our appearance here this morning.

Alternatively we would seek to adjourn the return date of the Order to Show Cause or any hearing that your Honor might decide is necessary pending determinations that are to be made in the Federal Court, and I will say more about that in just a moment.

There are two bases for our motion to discharge the Order to Show Cause, your Honor. The first basis is that there was an incomplete disclosure of relevant facts before this Court in connection with the application for that Order to Show Cause. Specifically the Division of Criminal Justice did not disclose to this Court the factual issues that were raised by their application for the order where we were already pending before Judge [Tr. p.5] Brotman in the Federal District Court down in Camden.

Now, the order that this Court entered on February 19th requires Mr. DeSantis, Mr. Monaghan, Foundations & Structures and William Monaghan Associates to show cause why certain documents which were seized during the execution of a warrant on October 5th should not be available for perusal by the State. The documents in question are documents which we allege are privileged under the attorney-client privilege or under the attorney work product privilege and they were sealed by the agreement of counsel during the course of an inventory after execution of the warrant. The fact that they were sealed

pursuant to agreement of counsel, your Honor, I believe is not disputed. It is stated in the verified petition in Paragraph 8, it is also stated in the affidavit of Sharon Donofrio which was submitted in the Federal Court action but which was also submitted as Exhibit 6 to my certification to this Court. And we [Tr. p.6] will return to the Donofrio affidavit in a moment.

Just to fill in the background a bit more, I believe this Court knows from having read our papers in late December of 1984, I believe December 26th to be exact, Mr. Monaghan, Mr. DeSantis, Foundations & Structures and Monaghan Associates together with two other plaintiffs filed suit in the Federal District Court in Camden under 42 U.S.C. Section 1963. They sought damages and injunctive relief in connection with violation—alleged violations of Federal Constitutional rights occurring in the course of—in connection with execution of the warrant, not simply focusing on the execution of the warrant itself, but centering around that event.

Defendants in the Federal Court suit are nine named individuals, all employees of the State of New Jersey being sued in their individual capacities. There are—most of the named defendants are employees of the Division of Criminal Justice. There is a defendant who is an [Tr. p.7] employee of the Department of Treasury and one who is with the New Jersey State Police.

The Federal Court defendants are represented in the Federal Court suit by the Appellate Section of the Division of Criminal Justice. They are not being represented by the Law Division. The defendants filed a motion to dismiss the Federal Court suit in late January of this year. On February 15th, plaintiffs filed a motion for preliminary relief in the form of return of documents which were improperly seized. Now they weren't seeking return of all the documents that were seized, they were seeking return

of documents in three categories, all of which plaintiffs feel were clearly outside the scope.

The three categories were, number one, documents outside the date set forth in the warrant, that date is September 8th, 1978.

Your Honor, I direct the Court's attention to my certification and Exhibit 6 to my certification which is the affidavit [Tr. p.8] of Sharon Donofrio that was submitted in support of that cross-motion, Exhibit C lists the documents which are dated prior to the date set forth on the warrant. And, as your Honor can tell, this list goes on for pages. There are something like 13 or 14 pages of documents listed with dates outside the September 8, 1978 date. So, we are not talking just a few documents. Exhibit E on Donofrio affidavit lists documents in the third category that plaintiffs were seeking return of those documents were documents plaintiffs allege are covered by the attorney-client privilege or the attorney work product privilege.

Again as you can tell by perusing Exhibit E, it goes on for pages and that is just a listing of specifically enumerated documents, 16 or 17 pages. Again not talking about just a few documents, we are talking about a wholesale listing of documents allegedly within the attorney-client or attorney work product privilege.

[Tr. p.9] Now, plaintiffs filed this motion, your Honor, as I said on February 15th, four days later the Division of Criminal Justice came into this court ex parte and sought the Order to Show Cause. The Order to Show Cause would allow them to unseal and use for investigative purposes the documents which plaintiffs are alleging in the Federal suit should be returned because they are covered by the attorney-client or attorney work product privilege. The very same documents, and I don't think there is any dispute about that. The application, as I said, was ex parte. We had no notice of it. We were not in any way aware

of it. There doesn't seem to be on the face of the papers any reason for the ex parte application, your Honor. There was no particular urgency or at least this Court didn't feel there was a particular urgency because you gave them a longer return date.

THE COURT: The Rule doesn't require notice on an Order to Show Cause.

MS. HOOKE: That is correct.

THE COURT: I can't recall in all [Tr. p.10] my years on the Bench ever having notice given to adverse counsel to obtain an Order to Show Cause without temporary restraints. There is no reason for them to notify you. It is no different than filing a notice of motion.

MS. HOOKE: Under these circumstances, your Honor, I think that as a matter of courtesy we might have been notified. I am aware that there is no violation of the Rule here. The only facts before the Court, your Honor, in support of this application is the verified petition.

Now Paragraph 10 of the verified petition mentions the Federal Court action. Paragraph 10 also states—I am reading from the verified petition—the first sentence, "As of this date, the subjects of the search have not filed any motion with Judge Lenox concerning the seized material." There is a second—the last sentence in this paragraph also states, "The failure of the subjects to move before Judge Lenox." There is emphasis [Tr. p.11] in this paragraph, your Honor, of a failure on the part of plaintiffs to move. There is absolutely no mention in this paragraph, your Honor, of the pending motion before Judge Brotman.

The State then took the Order to Show Cause, your Honor, and used it in the Federal Court action to try and get first an adjournment of the plaintiffs' cross-motion. Judge Brotman did not grant that adjournment, although he did put it off a week due to exigencies of his own calendar. They then argued in their papers that the is-



suance of this Order to Show Cause was a "very significant development" which was an additional reason why the Federal Court should abstain from jurisdiction over the entire 1983 action. So, they obtained this Order to Show Cause and then they used it in the Federal Court action.

Your Honor, the new rules governing professional conduct in New Jersey include a description of the obligation of counsel in an ex parte proceeding. It is 3.3(d) and the Rule reads: "In an ex parte proceeding, [Tr. p.12] a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse."

I don't think there is any question here, your Honor, that the pendency of our motion in Federal Court in connection with these very same documents was highly relevant information which should have been disclosed in fairness not only to the plaintiffs but to the Court. The conduct here on the part of the Division of Criminal Justice was highly improper and for this reason alone we feel the Order to Show Cause should be discharged. And I have to say, your Honor, that I am not particularly comfortable citing rules of professional conduct here when I am talking about the State of New Jersey, Division of Criminal Justice but I feel what happened here was serious and cannot be overlooked by this Court.

The second basis for our application to discharge the Order to Show Cause [Tr. p.13] is substantively the pendency of that motion before Judge Brotman. Now, the hearing was last Friday on the 8th. Judge Brotman is aware of this proceeding and he has asked to be informed as to the outcome. He was not able to render a decision on Friday simply because he is coming out of the end of a four-month criminal trial. He has had Ray Brown in his

courtroom for four months. The jury was out, as a matter of fact, and came in while we were arguing this motion.

It is—complex matters have been raised and he was not able to give us an answer on Friday. We do anticipate a response from him in short order. He has ordered the Division of Criminal Justice not to unseal the documents in question until—no matter what happens in this court, until we have had an opportunity to re-appear before him. He made it clear that in no way binds this Court but in terms of this Court's ability to look at the documents, but it is binding on the Division of Criminal Justice.

[Tr. p.14] Your Honor, the plaintiffs feel they have a federal cause of action under 42 U.S.C. 1983 as a result of the events on October 5th and they took that cause of action to Federal Court. This in no way reflects upon the ability of this Court or any other State Court to handle the cause of action. It was a simple choice on the part of defendants—on the part of plaintiffs. They are concerned, your Honor, about things like their standing to ask for a return of these documents. At this point in the State Court, it is not clear under some of the decisions like *State v. Casale* whether they could in fact move for return of the documents.

They are also concerned about a line of Supreme Court cases which have greatly limited a plaintiff's ability to maintain a later Federal Court action if he's had any sort of—if he's gone into State Court in any way for any kind of relief in connection with that action. They want to keep it all together and so they have gone into Federal Court in an [Tr. p.15] effort to keep the case and all the issues in one form and to have a Federal adjudication of what is basically a federal cause of action.

Again they are seeking in the Federal Court action not just a return of documents but their claims go to a whole course of conduct including use of the warrant process to coerce a corporation in a criminal investigation so it is a

whole course of conduct which they have—they are pursuing or claims arising out of a whole course of conduct which they are pursuing in the Federal forum.

If this Court were to also assert jurisdiction over this matter and continue hearings in this matter, it would simply end up with duplicity litigation. It is not an efficient use of judicial resources of either forum.

The State's assertion that the purpose of the Federal action is to get discovery in the criminal—in the—a possible criminal investigation against the plaintiffs is just totally unfounded. [Tr. p.16] We have not sought any injunctions against any sort of investigative proceeding in the Federal Court. The State of New Jersey since the filing of that action has issued at least three subpoenas that I am aware of that impinges upon our plaintiffs. We have not sought to quash those—move to quash those subpoenas. We have not in any way sought to impede the investigation. We did not move on Friday to enjoin this hearing. We are willing to allow the investigation to take its course, but we do feel that plaintiffs are entitled to remedies at least and relief in connection with the events of October 5th really looking at what happened in connection with that warrant on October 5th.

We are trying to avoid, your Honor, a conflict between the State Court and the Federal Court. It is totally unnecessary. Everybody's interest is served by getting an adjudication over who has the right to possession and use of the documents that have been sealed as well as the other documents that are a part of the [Tr. p.17] plaintiffs' Federal Court action. The State says all they want is some sort of adjudication. They don't have any interest in keeping these documents if in fact they are within the attorney-client privilege. They just want some sort of adjudication.

So, it is all before the Federal Court now. We can get an adjudication there. There is no reason at this point for the State Court to intervene so we would urge in the

interest of comity between the two judicial systems and in the interest of avoiding piecemeal and repetitious litigation that as a second basis this Court discharge the Order to Show Cause without further hearing because of the pendency of the matter before Judge Brotman.

In the alternative, your Honor, we would ask at least that the Court adjourn or continue this return date until Judge Brotman has had a chance to rule on the matters which have been placed before him. Mr. McGahn?

MR. McGAHN: Yes. May it please [Tr. p.18] the Court, your Honor.

I would just like to point out particularly one of the sets of records seized was a folder marked "State Grand Jury Investigation." It contained 15 items which were notes, memorandums, handwritten notes of the—Mr. Monaghan, memorandums and letters from me and various other attorneys from my office. And the purpose that I am concerned with there, they were read and then the files were resealed. As your Honor is aware of from *U.S. v. Silverthorne* and also in *State v. Sugar*, any of the taint which may come from the fact that both Mr. Monaghan and Mr. James and Mr. DeSantis ultimately had previously appeared before two grand juries in Cape May County, one on the 21st of November, 1983 and the other on March 26th, these notes had dealings and pertaining to those investigations, now to have their own work product and the statements which were made when the Criminal Justice Division knew that there were attorneys representing them we're very concerned about the taint [Tr. p.19] of those statements and self-written—handwritten statements of Monaghan.

THE COURT: Mr. Donovan.

MR. DONOVAN: Your Honor, I am going to be brief. I am going to address myself to what I see as the pertinent facts in this Order to Show Cause before your Honor.



THE COURT: On the motion, not the Order to Show Cause.

MR. DONOVAN: Fine, your Honor.

The motion is that the Order to Show Cause should be discharged. In support of that, they make reference to the fact that one D.A.G. Wilsey did not advise this Court of a motion pending in Federal Court. They make no mention of the fact that when that material was filed, it was served upon the representatives of the Appellate Division, the Division of Criminal Justice, didn't make mention of the fact that the verified petition and the Order to Show Cause was apparently supplied to this Court four days after the motion was filed in Federal Court.

[Tr. p.20] There's been no showing before this Court that anyone who was responsible for the preparation of that affidavit had prepared the affidavit with possession of the fact that this motion had been filed.

More importantly, your Honor, what has been glaringly absent from the arguments made by counsel is the previous conversations between Deputy Attorney General Wilsey and representatives of the plaintiffs in this federal action and who also represent people about whom allegations have been made that are the subject matter of State Grand Jury investigation. In particular what those representations were, your Honor, was that an application was going to be made before this Court seeking a determination as to whether or not the documents that were sealed by direction of representatives of this office came within the attorney-client privilege or came outside the scope of the search warrant that had been executed by this Court. No movement was ever made as a result of that. Rather at variance with the implicit [Tr. p.21] representation as the subject matter of conversations between these attorneys and this office, no application was ever filed with this Court. Rather an application is made, a complaint is filed in the United States District Court.

If one is talking about good faith, then I would submit to this Court rather than any absence of good faith on the part of this office, there is something clearly amiss in the actions taken by the representatives of the people about whom allegations have been made that are the subject matter of State Grand Jury investigation who also by chance represent these people in a complaint that has been made in the United States District Court. There's an ongoing investigation before the State Grand Jury.

Relevant to those allegations are the full and complete investigation to be conducted by this office. In order to facilitate that investigation, this application was made to this Court for a determination as to whether or not those [Tr. p.22] documents should not be sealed. That application afforded the attorneys for the people who were named as—to make a return of that Order to Show Cause afforded them full opportunity to raise these arguments before this Court.

In addition, your Honor, I would submit that the whole conduct of the attorneys who—these people about whom allegations have been made that are the subject matter of the State Grand Jury investigation has been to impede, delay this investigation.

Quite frankly, your Honor, I see an absence of a good faith on the part of attorneys who represent they are moving to resolve this matter as quickly as possible when in fact there was never any attempt made to fulfill the representations that were made by these attorneys through representatives of their office.

Your Honor, I can't comment because I was not present and was not privy to the particulars of what transpired before Judge Brotman. It is my understanding from [Tr. p.23] conversations with Deputy Attorney General Nodes this morning as to what transpired there, that Judge Brotman indicated rather than this Court deferring, the only direction that he was providing was that this office not



unseal those documents. Quite frankly, your Honor, that is quite consistent with the course of action that this office would advocate. It would seem to this office that the most judicious way of resolving this issue is for this Court to take possession of those documents, make—review them with the point of view in mind of whatever arguments the representatives of the individuals from whom and entities from whom those documents have been sealed and with those arguments in mind, make the adjudication as to whether or not these documents come outside the parameters of the subpoena—of the search warrant that was issued by this Court or alternatively come within any attorney-client privilege.

Your Honor, I don't have anything further at this point. I would ask [Tr. p.24] though, I think it might be appropriate if your Honor has any questions concerning the accuracy of the representation that I have just made as to my conversations with D.A.G. Nodes that D.A.G. Nodes perhaps could add something regarding that area.

MR. NODES: Yes, May it please the Court. I would just like to explain the parameters of the action in the Federal District Court and the motion that was heard last Friday.

The Division of Criminal Justice as representatives of the defendants in that action, moved to dismiss their complaint or in the alternative moved to ask the Federal District Court to abstain from taking any action requiring injunctive relief pending a State adjudication of these issues.

We noted that the same issues were presented in the State Court which were to be presented in the Federal Court. Representatives of the plaintiff have noted that Judge Brotman abstained from writing a decision last Friday. They have also [Tr. p.25] said that they expect a decision in short order.

I certainly got a quite different impression from the same conversation with Judge Brotman. What Judge Brot-

man indicated was that this was a complex matter, that he had to have a chance to review it and that an opinion would be necessary and that we might not have an opinion for some time. And that is certainly my recollection of what Judge Brotman said. He certainly didn't indicate that he would want the State proceedings adjourned. In fact, as plaintiffs' counsel has represented, Judge Brotman is interested in what action this Court does take and specifically framed his order concerning the unsealing of documents in such a manner as to allow this Court to review those documents and make whatever decision was necessary concerning whether or not they fall within the scope of the warrant, whether or not they violated the attorney-client privilege and whether or not they violated the attorney work product privilege. He did absolutely nothing that [Tr. p.26] would indicate that he wants this Court to hold back.

One of the arguments that we made to Judge Brotman and I think which is relevant here today is the fact that the plaintiffs contention that by going to the Federal District Court they will avoid duplication of litigation is very frivolous. Clearly if the Federal District Court rules in favor of the defendants or representative of the State of New Jersey, we will not be able to use the documents unless we come back into this Court and get this Court's adjudication. Certainly this Court is not going to be bound concerning a State proceeding by what a Federal District Judge says in a civil proceeding.

So, there will be a very definite necessity for two different adjudications. If Judge Brotman hears them first and that is why we ask Judge Brotman to abstain and he has not decided whether he is going to abstain or not at this point, but he has taken that under consideration. But, that is also why I believe Judge Brotman was [Tr. p.27] perfectly willing not to order that this proceeding be adjourned not to even request it, not even to suggest it but rather to suggest the opposite. What he said was that this

proceeding would have to go forward because he wasn't going to make an opinion Friday and he couldn't make an opinion Friday and he gave this Court the full opportunity to make a decision and to review the documents. And I believe that is an accurate representation of Judge Brotman's feelings in the matter even though we don't have a full opinion yet.

Now, plaintiffs in the 1983 action also have noted that they haven't done anything to enjoin a State proceeding. I point out and, therefore, they are not trying to interfere with the investigation. I would point out that one counsel for these plaintiffs made precisely the same statement last Friday except what he said at the end was that they hadn't done anything to enjoin State proceedings yet. And I think that is indicative of what they're [Tr. p.28] actually going to do and are trying to do and what's being attempted in this matter.

Simply stated, there is no reason why this Court should adjourn this proceeding that is not in keeping with what Judge Brotman requested at all and we believe an adjudication by this Court, this Court is necessary.

MS. HOOKE: Your Honor, if I may, first of all I would like to respond to Mr. Donovan's statement that their representations from our counsel that there would be an application in State Court with respect to those papers, there was never any representation as to where there would be an application. There were representations as to the fact that an application would be made and that has occurred.

The second thing—

THE COURT: Certainly it wasn't my intention that you should go somewhere else and I was the one that made the suggestion.

MS. HOOKE: What suggestion was that, your Honor?

[Tr. p.29] THE COURT: I received a telephone call. I said that they should be sealed and that an application would be made before me.

MS. HOOKE: Okay. It is a little confusing, your Honor. There are two sealings that we are talking about. And the one that your Honor is referring to occurred on the date of the execution of the warrant and the dispute at that time, as it is set forth in the certification and the verified petition also, was or the—

THE COURT: It was only because of that sealing that anything was sealed. Absent that sealing, nothing would have been sealed.

MS. HOOKE: There was a subsequent sealing.

THE COURT: I understand that. I would not have permitted any sealing were there not to be an application before me under that agreement. It was a valid warrant. They were down there with a right under the law by a Court order to have those documents now by an agreement that [Tr. p.30] the documents would be sealed and you'd come before me only because as you recall it was about five o'clock on Friday afternoon. I expected that counsel would be back up into Mercer County within a couple days.

MS. HOOKE: Your Honor—

THE COURT: That was my intention.

MS. HOOKE: That first dispute was over the adequacy of the receipt. Counsel then later went down and took its own inventory and that issue more or less disappeared. There was, during the course of that inventory—the fact it disappeared is clear because the State has been looking at all of the documents, as far as we can tell, except the ones that were subsequently sealed by agreement of counsel so the parties have more or less been proceeding on the assumption that after counsel took this detailed inventory the adequacy of the receipt although, you know,



we might still have a problem as to whether it was an adequate receipt. Nevertheless, we now had an inventory and in Ms. Donofrio's affidavit it is clear that [Tr. p.31] documents which were sealed on one date were unsealed when she went back on another date except for the privileged documents.

THE COURT: My point is that there was absolutely no reason why the Attorney General should not have expected that you would be coming before me. You did not tell them that you were going to the United States District Court. You knew what you were doing. You didn't tell them and now you are saying that they should be criticized for the position which they took.

MS. HOOKE: Your Honor, it is a little bit difficult to think through exactly what your procedure is going to be in the midst of—

THE COURT: I don't have any trouble thinking it through. The records were seized by the Attorney General under an order of this Court and it is to be expected that you would come back to this Court. If you intended to go somewhere else, then you should have told them or at least don't criticize them now for not [Tr. p.32] realizing that it wasn't said. I am sure it was the furthest thing in the Attorney General's mind that you would go to the Federal Court when this document that had—this Court had issued the order and this Court was involved in it.

MS. HOOKE: Your Honor, if there was a misunderstanding as to where we would make our application—

THE COURT: Wasn't a misunderstanding there—

MS. HOOKE: There was not a representation that they would appear in the State Court and that was the only point that I wanted to address.

I would also like to address the comment of Mr. Donovan that we have been trying to impede and delay. It was not—

THE COURT: What difference does it make, Ms. Hooke. I have to go to Perth Amboy. It seems to me there is an awful lot of argument here about matters which aren't important.

Suppose you are trying to impede, is that going to change anything?

[Tr. p.33] MS. HOOKE: Your Honor, it is a comment which is factually inaccurate.

THE COURT: It is also immaterial.

MS. HOOKE: Whether—

THE COURT: Whether you are trying to impede or aren't trying to impede, the decision is going to be the same, isn't it?

MS. HOOKE: I can't look into your Honor's mind and determine what weight that argument will have.

THE COURT: Why don't you address the real issue. What difference does it make that you went to the United States District Court. How does that affect this Court?

MS. HOOKE: Your Honor, I don't think it affects this Court at all. The issue before this Court—

THE COURT: Now we are in agreement.

MS. HOOKE: I'm sorry?

THE COURT: Now we are in agreement. I have an ongoing State proceeding. You filed another action, so what.

[Tr. p.34] MS. HOOKE: Well, there my argument was based—had two bases, your Honor. One was that they neglected to tell your Honor that the very same motion was already before that District Court Judge.

THE COURT: I don't see that it would make any difference.



MS. HOOKE: That is a determination for your Honor to make, but it was relevant information. They thought it was relevant enough to tell you that there was a pending Federal Court action. They did not tell you that the very documents they were seeking to look at were already put before another judge. They then argued in Federal Court that this was an extremely relevant, an extremely significant development, so they are manipulating your Honor, they are manipulating the Court system in order to forum shop.

THE COURT: That is what they said you are doing. So, I can listen to both of you say that the other is trying to manipulate and it is not going to solve anything. They say that you are trying to [Tr. p.35] avoid this Court's jurisdiction by going over there.

MS. HOOKE: Your Honor, we have a federal cause of action. We chose a forum in order to bring all of our claims together in one forum and in order not to be foreclosed at a later date by the doctrines of res judicata or collateral estoppel from bringing that federal cause of action. It is in no way a reflection on this Court or any other State Court that we made that choice.

We are simply now seeking an opportunity to let that proceeding go ahead. It will serve everyone's interest. The State had an opportunity to get a hearing on this on March 1. We weren't the ones that sought the delay. They were the ones that went into the Federal Court and sought a delay. If they are really interested in a fast determination, your Honor, then they can—they have got the forum with Judge Brotman. If Judge Brotman does decide to abstain from jurisdiction, we are all back here. I don't think that a matter of one or [Tr. p.36] two weeks delay—I do not agree with Mr. Nodes' memory of Judge Brotman's statements that it would be some time. We have an application for emergent relief and my understanding would be that that—that decision might take some precedence over other

reserved decisions. He did not say one way or the other in terms of time, it was my memory. But, I don't think since the State—the State did not feel any urgency, your Honor, with respect to these documents until plaintiffs' filed their cross-motion, then they came in and said it was urgent. I think that it is very curious that the urgency arose only after the plaintiffs had moved in Federal Court.

Just one more comment. D.A.G. Nodes said this Court would not be bound by any ruling in the Federal Court. The Division of Criminal Justice, however, would be bound by the doctrine of collateral estoppel by any factfinding.

Your Honor, just one last comment. D.A.G. Donovan said there has been no showing that anyone connected with the [Tr. p.37] verified petition was connected with the Federal Court action. I would suggest at this point it is their burden to show that. That is a representation on the part of the State that they were not—D.A.G. Wilsey or those participating in the preparation of the verified petition were not aware of our cross-motion. If the State is prepared to make that representation, that is one thing, but at this point I believe it is their burden to show that there was no awareness or that the individuals were not involved in both actions and I don't believe that that showing can be made.

MR. DONOVAN: Your Honor, I am going to be brief.

THE COURT: I don't need anything further.

MR. DONOVAN: Thank you, your honor.

THE COURT: This is a motion to quash the Order to Show Cause, for costs and attorneys fees brought by Theodore DeSantis, William E. Monaghan and [Tr. p.38] Foundations & Structures, Incorporated.

I have heard what I believe to be lengthy argument on matters which are totally immaterial. I found absolutely no merit to the motion when I read it and I have heard

nothing to change my mind. With all due respect to the learned Federal Judge, even if he wanted me to abstain, I would not do so, absent an injunctive order. The Federal Court has a right, of course, to enjoin this Court. The Federal Court has a right to enjoin the Attorney General, but absent any such injunctive order, I have an ongoing State proceeding and there is absolutely no reason why the State proceedings should not continue.

Consequently, I find the pendency of the Federal action to be immaterial to this Court and the issue before me. The New Jersey proceedings are criminal in nature. We have an ongoing criminal investigation involving violations of the criminal laws of this State. There is a grand jury in session. The Attorney [Tr. p.39] General has represented that that grand jury is investigating these alleged criminal violations. The filing of the Federal suit does not in any way affect that ongoing criminal investigation. The Federal proceeding is civil in nature. It involves primarily federal law, not state law and to the extent that it involves state law to some extent it does not involve the same state law that we are talking about. There is no reason whatsoever why these two cases may not proceed simultaneously and there is no conflict in their doing so.

If both Courts ultimately permit the unsealing of the documents, they may be unsealed. If I permit the unsealing of the documents and the Federal Court forbids it by order directed to the Attorney General, they may not be unsealed. This doesn't mean that I am bound by that order but it means that the defendants in the Federal Court are so bound for reasons that the Federal Judge finds to be appropriate under federal law.

We have the same documents involved [Tr. p.40] apparently as a portion of the federal case as are involved in the motion before me. The issues are not necessarily the same. The law is not necessarily the same. And, con-

sequently, the issues would not be the same if they involved different law.

I find no impropriety on the part of the Deputy Attorney General in not commenting on the civil action in the Federal Court since in my judgment that civil action is immaterial in the absence of an injunctive order restraining this Court. I am acting under jurisdiction which is given to me by the New Jersey law. The Deputy Attorney General has a right to pursue his rights and remedies in this Court. The movants entire argument is premised on a contrary theory which I simply find devoid of merit.

The question before me relates to State proceedings based on State rights and State law and the Deputy Attorney General's proceeding was neither improper nor unethical. Had I been advised of the Federal Court civil action, the simple [Tr. p.41] answer to this is I still would have signed the Order to Show Cause and, as mentioned by the Deputy Attorney General, I had the thought as I read it that rather than the Deputy Attorney General not being the one who was forthright, that it was the movants on this motion.

The agreement to seal the documents in question I am sure in the minds of the Attorney General—mind of the Attorney General and legitimately so was that the application would be brought before this Court which issued the order which gave the State the right to obtain those documents. Instead they brought a civil action in another jurisdiction and did not so inform the Court and attempted to ignore what I believe was a tacit agreement and avoid this Court's jurisdiction by going to another Court. That is not to say that they didn't have a right to file that civil action, but I don't see why this Court should not have been so informed and why the Attorney General should not have been so informed as to the intention [Tr. p.42] to do so.



The movants have filed extensive documents, a brief, an affidavit, but have not cited a single case in support of their position that a motion in a civil action in Federal Court should stay a criminal investigation in the State Court. And I suggest that this is simply because the proposition is facially faulty. The State has its own interest in an ongoing criminal investigation within—involving criminal activity alleged to have occurred within its borders. If the Federal Court feels it is sufficiently important that this Court not proceed, that the Attorney General's criminal investigation should be halted and the Federal Court may say so, I strongly suspect that the Federal Court will not do so.

Judge Brotman apparently has already indicated what I would think would be the appropriate procedure and that is that the State would first decide it. It is a common procedure. Matter of fact, a requirement in many areas that State [Tr. p.43] remedies be exhausted before the Federal Court will act. And with the State having jurisdiction, Judge Brotman can sit back and say, if and when the New Jersey State Court decides that the record should be unsealed, I will determine whether the Federal Court will act and at that time enter an injunctive order, if he wishes to do so in order that federal issues may be raised.

The case should appropriately be decided here at least in the first instance and for that reason the motion is denied.

Now, I don't know where that leaves us with respect to the Order to Show Cause. I certainly am not going to adjourn this proceeding pending a Federal Court determination for the reasons that I have just stated. The subjects of the search who are respondents on the Order to Show Cause have filed no opposition to the Order to Show Cause on its merits. I understand that the issue is whether the documents under seal are first privileged [Tr. p.44] and, second, whether they are within the search war-

rant but this is the return day of the Order to Show Cause. There's been no motion made for a return of property which would be the appropriate procedure under our Rules of Court under Rule 3:5-7.

In the absence of such a motion, I see no basis for me to deny the relief sought in the Order to Show Cause. So, absent some other suggestion, I will order the unsealing by the Deputy Attorney General unless there is a request for an adjournment to file an appropriate motion.

MS. HOOKE: Your Honor, we would request that the matter be adjourned for a very short time to enable us to submit papers on the merits. I know your Honor is aware that there is applicable State law here, *State v. Sugar* on the attorney-client privilege, *State v. Smith* and In Re Grand Jury proceedings on other factual issues so—

THE COURT: I say that I am not familiar with the law although I do a lot of State Grand Jury work. I have never [Tr. p.45] had that issue before me in another matter, so I will require briefs, of course.

Mr. Donovan wishes—

MR. DONOVAN: Your Honor, if I can make a suggestion. I am not familiar with the name of the case at this point in time, I know there is case law from the Appellate Division to the effect that when an issue is raised as to the appropriate invocation of the attorney-client privilege, the procedure that is suggested in that opinion by Judge Baime, and I can supply the Court with a copy, of course, will make reference to the materials that we supplied is that the documents—material about which the attorney-client privilege is at issue should be delivered to the reviewing Court for them to review with the point in mind of the arguments that are being raised by the proponent of the issue and, of course, hopefully also with the point in mind of the people who are opposing the issue, the



invocation rather, if that is the appropriate position by this office.

[Tr. p.46] So, my suggestion would be, your Honor, that perhaps the appropriate procedure to be followed is that this office provide the Court with the sealed materials about which the attorney-client privilege has been raised. Presumably that the proponents of that invocation are going to make some type of arguments in moving papers with this Court.

MS. HOOKE: Your Honor, I think it is likely this time that we will seek to broaden our application in State Court to include the return of the same documents that we are seeking in the Federal Court. We would like time to submit—

THE COURT: These are documents—

MS. HOOKE: On those issues—

THE COURT: These are documents which have already been turned over.

MS. HOOKE: The State has them in their possession, your Honor. I am talking now about documents outside the date of the warrant.

THE COURT: Not under seal?

MS. HOOKE: That is correct. So, [Tr. p.47] we would like an opportunity to proceed, at least consider proceeding on a broader basis than just the attorney-client privilege and I do think that it is—even on the attorney-client privilege it would be helpful for the Court to have the applicable law before it. I do agree that ultimately we will need a hearing on the documents that are allegedly within the attorney-client privilege, the documents outside the scope of the warrant because of date, your Honor.

I think, you know, it could be done very—I don't think there is a hearing—in fact we might even be able to get

this agreement from the State with respect to those documents. But, there are documents also that are—that made—other than those that were named in the warrant were also taken which also have—is causing our client a great deal of difficulty to run their business because the wholesale taking of their documents. We would wish to put facts in connection with that before the Court.

[Tr. p.48] THE COURT: Well—

MR. DONOVAN: Your Honor, I see no reason why any arguments as to the attorney-client privilege can't be raised. Any arguments as to the sealed documents cannot be raised in the immediate future. If they research that, they are going to make arguments dealing with other aspects of the material or the manner in which materials were seized, your Honor. Those arguments can well be made at any point in time.

THE COURT: Well—

MR. McGAHN: Your Honor, I would submit—

THE COURT: They can also be made before any judge.

MR. DONOVAN: Correct, your Honor.

THE COURT: That is a separate motion. Rule 4:5-7 is entitled Motion to Suppress Evidence and for return of property, and it requires a motion by your client and it can be made at any time until after 30 days from the date of the plea, if an indictment is returned. [Tr. p.49] That's really not what I have before me. I have an Order to Show Cause in connection with sealed documents. If you file another motion, it may not come to me because that motion is typically heard by a judge of the Criminal Division. Right now, my only question involves the documents under seal.

MS. HOOKE: Well, as to those documents, your Honor, we still think it would be helpful, your Honor, for you to have the applicable law.

THE COURT: Oh, certainly, yes. I am talking about your statement that you are going to broaden the issue. You are not going to broaden the issue on this Order to Show Cause because the Order to Show Cause frames the issue. If you intend to raise other issues, you will do so by your own motion.

MS. HOOKE: And is your Honor saying that that motion should be brought in the normal course and assigned out under the normal course?

THE COURT: You will file it and [Tr. p.50] we will decide what we will do with it procedurally.

MS. HOOKE: Okay.

THE COURT: I don't know. I have to see.

MS. HOOKE: When would your Honor like papers in connection with this?

THE COURT: Mr. Donovan, they are the ones that want to break the seal.

MR. DONOVAN: Your Honor, I would suggest that this be—I am not going to be obstinate. I would—your Honor would like case law pertaining to the issues that have been raised by virtue of the Order to Show Cause that is attorney-client privilege, but on the other hand, your Honor, I would like a—like this matter to be heard as soon as possible. I mean perhaps the most appropriate thing is to get a position from counsel as to how much time she is going to require and presumably with a point in mind that since this order was signed quite a while ago there is full opportunity for the necessary research to have been done and presumably [Tr. p.51] that has been done so I would suspect that it should be a matter of one or two days for them to prepare whatever is necessary, legal brief is required.

MS HOOKE: Your Honor, we could have a brief before the Court in a week. Would be next Monday.

MR. DONOVAN: Your Honor, if I could make a suggestion. The State is going to want to file a response. To facilitate our ability to file a response, my suggestion would be that their brief be filed by this Friday which enables the State to utilize the weekend to prepare a responding brief as soon as possible.

THE COURT: My only desire is that I have both briefs a week in advance. I like to read my motions over the weekend and not be troubled with them during the week when I am otherwise engaged. We can have it on Monday again and the respondents to the Order to Show Cause can file their brief by March 18th. The State by March 22nd and the hearing on March 25th.

MR. DONOVAN: That is fine, your [Tr. p.52] Honor.

THE COURT: All right.

MR. DONOVAN: Thank you, your Honor.

MS. HOOKE: Thank you, your Honor.

THE COURT: You're welcome.

(Whereupon the matter then ended.)

JA- 94

[Tr. p.53]

IN THE MATTER OF A SEARCH

WARRANT DATED OCTOBER 4, 1984

**CERTIFICATION**

I, SANDRA L. DeLORENZO, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the above-entitled matter and that the same was duly taken and transcribed by me.

/s/ SANDRA L. DeLORENZO  
SANDRA L. DeLORENZO, C.S.R., CM  
Official Stenographic Reporter  
License # X100462

Dated: March 14, 1985

JA- 95

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

**NO. 85-5589**

WILLIAM MONAGHAN, THEODORE DeSANTIS, JOHN JAMES,  
FOUNDATIONS & STRUCTURES, INC., WILLIAM E. MONAGHAN  
ASSOCIATES, and MJD CONSTRUCTION COMPANY, INC.,  
*Appellants,*

v.

DEAN DEAKINS, New Jersey Division of Criminal Justice;  
IRVING DUBROW, New Jersey Division of Criminal Justice;  
ROBERT GRAY, New Jersey Division of Criminal Justice;  
RONALD LEHMAN, New Jersey State Police; ALBERT G.  
PALENTCHAR, New Jersey Division of Criminal Justice;  
DONALD A. PANFILE, New Jersey Department of Treasury;  
WALTER PRICE, New Jersey Division of Criminal Justice;  
WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice;  
RONALD SOST, New Jersey Division of Criminal Justice;  
JOHN DOE, an individual co-ordinating a search of the  
premises of Foundations & Structures, Inc.; JOHN DOE, an  
individual supervising investigators in the New Jersey Division  
of Criminal Justice; and JOHN DOE, an individual  
training investigators in the New Jersey Division of Criminal Justice

**ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT  
FOR THE DISTRICT OF NEW JERSEY—CAMDEN  
(D.C. Civil No. 84-5369)**

Present: ADAMS, GIBBONS and STAPLETON, *Circuit  
Judges*



**JUDGMENT**

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel April 17, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered August 8, 1985, be, and the same is hereby reversed insofar as the complaint was dismissed and affirmed insofar as the motion for preliminary injunction was denied. The cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

/s/ M. ELIZABETH FERGUSON  
Chief Deputy Clerk

July 31, 1986

# **PETITIONER'S BRIEF**

MAR 13 1987

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

DEAN DEAKINS, New Jersey Division of Criminal Justice;  
IRVING DUBOW, New Jersey Division of Criminal Justice;  
ROBERT GRAY, New Jersey Division of Criminal Justice;  
RONALD LEHMAN, New Jersey State Police; ALBERT G.  
PALENTCHAR, New Jersey Division of Criminal Justice;  
DONALD A. PANFILE, New Jersey Department of Treasury;  
WALTER PRICE; New Jersey Division of Criminal Justice;  
WILLIAM SOUTHWICK, New Jersey Division of Criminal  
Justice; RONALD SOST, New Jersey Division of Criminal  
Justice; JOHN DOE, an individual co-ordinating a search of the  
premises of Foundation & Structures, Inc.; JOHN DOE, an  
individual supervising investigators in the New Jersey Division  
of Criminal Justice; and JOHN DOE, an individual training  
investigators in the New Jersey Division of Criminal Justice,  
*Petitioners,*

vs.

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES,  
FOUNDATIONS & STRUCTURES, INC., WILLIAM E. MONAGHAN  
ASSOCIATES, and MJD CONSTRUCTION COMPANY, INC.,  
*Respondents.*

**On Writ Of Certiorari To The United States Court Of  
Appeals For The Third Circuit**

**BRIEF OF PETITIONERS ON THE MERITS**

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53/104



### QUESTIONS PRESENTED

1. Must federal courts, by virtue of a 42 U.S.C. sec. 1983 action for the return of property seized pursuant to a warrant, filed by the targets of an ongoing state grand jury investigation, intrude into that investigation despite the *Younger* abstention doctrine where the federal complainants may seek redress from the state court which supervised the grand jury and issued the warrant?

2. Are federal courts absolutely barred from exercising their discretion to dismiss an ancillary claim for damages when they properly abstain from the equitable portion of a 42 U.S.C. sec. 1983 action?

## PARTIES BELOW

All parties below are parties to this petition.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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**No. 86-890**

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DEAN DEAKINS, New Jersey Division of Criminal Justice;  
IRVING DUBOW, New Jersey Division of Criminal Justice;  
ROBERT GRAY, New Jersey Division of Criminal Justice;  
RONALD LEHMAN, New Jersey State Police; ALBERT G.  
PALENTCHAR, New Jersey Division of Criminal Justice;  
DONALD A. PANFILE, New Jersey Department of Treasury;  
WALTER PRICE, New Jersey Division of Criminal Justice;  
WILLIAM SOUTHWICK, NEW JERSEY DIVISION OF CRIMINAL  
JUSTICE; RONALD SOST, New Jersey Division of Criminal  
Justice; JOHN DOE, an individual co-ordinating a search of  
the premises of Foundation & Structures, Inc.; JOHN DOE,  
an individual supervising investigators in the New Jersey  
Division of Criminal Justice; and JOHN DOE, an individual  
training investigators in the New Jersey Division of Criminal Justice,

*Petitioners,*

vs.

WILLIAM MONAGHAN, THEODORE DESANTIS,  
JOHN JAMES, FOUNDATIONS & STRUCTURES, INC.,  
WILLIAM E. MONAGHAN ASSOCIATES, and  
MJD CONSTRUCTION COMPANY, INC.,

*Respondents.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Third Circuit**

## BRIEF FOR PETITIONERS

### OPINIONS BELOW

The Order and written opinion of the United States District Court for the District of New Jersey is reproduced as Appendix B to the petition for a writ of certiorari.

The written opinion of the United States Court of Appeals for the Third Circuit, published at 798 F.2d 632 (3d Cir. 1986), is reproduced as Appendix D to the petition for a writ of certiorari.

The Order of the United States Court of Appeals for the Third Circuit denying the petition for an en banc rehearing is reproduced as Appendix E to the petition for a writ of certiorari.

The amended Order of the United States Court of Appeals for the Third Circuit denying the petition for an en banc rehearing is reproduced as Appendix F to the petition for a writ of certiorari.

### JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. sec. 1331, respondents filed a complaint in the United States District Court for the District of New Jersey. On August 6, 1985, the District Court entered an order dismissing the complaint.

Respondents filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit under 28 U.S.C. secs. 1291 and 1292(a). The United States Court of Appeals for the Third Circuit filed its opinion on July 31, 1986.

Thereafter, petitioners filed a timely petition for an en banc rehearing under *Fed. R. App. P.* 35(b) and 40(a). The

United States Court of Appeals for the Third Circuit denied that petition in an order filed August 29, 1986. Thereafter, the court issued an amended order, filed September 4, 1986, to substitute for its order of August 29, 1986.

Petitioners filed a petition for a writ of *certiorari* on November 26, 1986. This Court granted the petition on January 27, 1987. This Court has jurisdiction pursuant to 28 U.S.C. sec. 1254(1).

### UNITED STATES STATUTES INVOLVED

#### 42 U.S.C. sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

### NEW JERSEY STATUTES INVOLVED

#### N.J. STAT. ANN. sec. 2A:73A-2 (West 1976)

**2A:73A-2. Permanent impaneling; petition for impaneling of additional grand jury; determination by assignment judge**

There shall be at least one grand jury which shall have jurisdiction extending throughout the State serving at all times. Such State grand jury shall be impaneled by an assignment judge of the su-



perior court designated for this purpose by the Chief Justice.

Whenever the Attorney General or the Director of the Division of Criminal Justice deems it to be in the public interest to convene one or more additional State grand juries, he may apply in writing to the aforementioned assignment judge for an order in accordance with provisions of this act. Said assignment judge may, for good cause shown, order the impaneling of such additional State grand juries in accordance with said application, in which event each said grand jury shall have Statewide jurisdiction.

**N.J. STAT. ANN. sec. 2A:73A-3 (West 1976)**

**2A:73A-3. Powers and duties; applicable law; rules and regulations**

A State grand jury shall have the same powers and duties and shall function in the same manner as a county grand jury established pursuant to Title 2A of the New Jersey Statutes except that its jurisdiction shall extend throughout the State. The law applicable to county grand juries shall apply to State grand juries except insofar as they are inconsistent with this act. The Supreme Court may promulgate such rules and regulations as it deems necessary to govern particularly the procedures of State grand juries.

**N.J. STAT. ANN. sec. 2A:73A-6 (West 1976)**

**2A:73A-6. Judicial supervision**

Judicial supervision of the State grand jury shall be maintained by the assignment judge who issued the order impaneling such grand jury, and all indictments, presentments and formal returns of any kind made by such grand jury shall be returned to such judge.

**NEW JERSEY COURT RULES INVOLVED**

**NEW JERSEY COURT RULE 3:5-7(a)**

**3:5-7. Motion to Suppress Evidence and for Return of Property**

(a) Notice; Time. On notice to the prosecutor of the county in which the matter is pending or threatened, to the applicant for the warrant if the search was with a warrant, and to co-indictees, if any, and in accordance with the applicable provisions of *R. 1:6-3* and *R. 3:10*, a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding, may apply to the Superior Court only and in the county in which the matter is pending or threatened to suppress the evidence and for the return of the property seized even though the offense charged or to be charged may be within the jurisdiction of a municipal court. Such motion shall be made within 30 days after the initial plea to the charge unless the court, for good cause shown, enlarges the time. A motion made before the trial shall be determined before trial. The motion may be made after trial has commenced only if the trial court finds that defendant could not reasonably have made it prior thereto.

**NEW JERSEY COURT RULE 3:6-10**

**3:6-10. Discharge; Continuance of Term**

(a) Term. A grand jury shall serve until discharged by the Assignment Judge, but not longer than 20 weeks unless the Assignment Judge shall order it continued as hereinafter provided. A grand jury shall not be discharged before the expiration of its term of service except for good

cause. The continuance of such grand jury shall not affect the usual drawing, selecting and serving of further grand juries.

(b) Order for Continuance. Whenever it appears to the Assignment Judge that the grand jury has not completed its labors, although its ordinary term is about to expire, he may, if satisfied of the necessity therefor, order that its term be continued. The order shall be made and filed within the session of court for which such grand jury shall have been drawn, and shall provide a continuance for a definite period of time not exceeding 3 calendar months, provided, however, that the Assignment Judge may make a further order, or orders, continuing such grand jury in office for a further term or terms of 3 calendar months each.

#### **NEW JERSEY COURT RULE 3:6-11**

##### **3:6-11. Impanelment and Judicial Supervision of State Grand Jury**

(a) Generally. All rules relating to grand juries shall apply to the State Grand Jury except as otherwise specifically provided by statute or rule.

(b) Designation of Assignment Judge. The Chief Justice shall designate an Assignment Judge of the Superior Court to impanel and supervise the State Grand Jury or Grand Juries. The Chief Justice may also designate one or more Judges of the Superior Court to assist said Assignment Judge with regard to impanelment and supervision of the State Grand Jury or Grand Juries and to perform such other duties and responsibilities with regard thereto as ordered by the Chief Justice or the designated Assignment Judge.

#### **STATEMENT OF THE CASE**

The Honorable Samuel D. Lenox, Jr., is the Assignment Judge of the Superior Court of New Jersey for Mercer County, New Jersey. He is also the judge who has been designated by the Chief Justice of the New Jersey Supreme Court, pursuant to N.J. Stat. Ann. secs. 2A:73A-2, 2A:73A-3, and 2A:73-6 (West 1976) and New Jersey Court Rule 3:6-11(b), to supervise the state grand jury, which is the only grand jury established under state law having jurisdiction throughout the state. (App. B. to the Petition for a Writ of Certiorari, p. 16a).

On October 4, 1984, petitioner Palentchar, who is a state investigator assigned to the New Jersey Division of Criminal Justice, appeared before Judge Lenox and applied for a search warrant to search for evidence of various criminal activities such as theft, bribery, and tampering with records at the premises of respondent Foundations & Structures, Inc., in Tuckahoe, New Jersey. Judge Lenox agreed to issue and did issue the warrant, which authorized the seizure of numerous file materials including contracts, bid documentations, change orders, job meeting minutes, site logs, truck logs, tipping fee records, purchase orders, vendors' payments and invoices, disbursements and receivables records, correspondence, memoranda, deeds, cancelled checks, and appraisals pertaining to several business agreements in which Foundations & Structures was involved. (JA 37-38). Foundations & Structures, Inc., is owned by respondents DeSantis, Monaghan, and James, and is engaged in the engineering and construction business. (App. D to the Petition for a Writ of Certiorari, p. 22a). Monaghan, DeSantis, and James, are also owners of respondent Monaghan Associates and MJD Construction Company, Inc. *Id.*

On October 5, 1984, petitioner Palentchar and the remaining petitioners, all of whom are state law enforcement officers, executed the search warrant. The circumstances



surrounding the execution of this warrant gave rise to the federal litigation.

According to the federal complaint which respondents later filed, the warrant was executed at approximately 9:00 a.m. (JA 18, Count I, para. 5). Respondents allege that the execution of the warrant was objectionable for several reasons. Specifically, petitioners unreasonably refused to defer to the advice of the employees of Foundations and Structures, Inc., as to where the pertinent files could be located and chose, instead, to conduct their own thorough search of the premises for seizable files and documents. (JA 18, Count I, para. 7(a)). Persons present on the premises, including respondents Monaghan, DeSantis, and James, were required to enter the main office and were "illegally detained" until each presented identification. (JA 19, Count I, para. 7(c); JA 28, Count VI, para. 3). The entrance to Foundations & Structures, Inc., was barricaded and vehicles which attempted to leave while the search was in progress were "illegally searched." (JA 19, Count I, para. 7(d)). Unauthorized photographs were taken (JA 19, Count I, para. 7(b)), and serial numbers of construction machinery and vehicles were "illegally recorded." (JA 19, Count I, para. 7(e)). Petitioners "conducted themselves rudely and arrogantly," made unauthorized use of the telephones, and refused to allow others to obtain access to the phones. (JA 20, Count I, para. 10). The search itself was "unlawfully motivated" (JA 23, Count II, para. 6), in that it was a mere pretextual subterfuge designed to coerce respondents' cooperation in the on-going investigation. Respondents' complaint alleges that the unlawful motivation is evidenced by the fact that after the search was in progress, petitioners served three subpoenae upon respondents, two of which requested documents which were within the scope of the warrant (JA 19-20, Count I, para. 8), and the third of which was blank when petitioners arrived and was completed only after the search was in progress. (JA 20, Count I, para. 9).

Beyond this, respondents allege that petitioners refused to give respondents "a complete and proper return and inventory as is required under the laws of the State of New Jersey." (JA 20, Count I, para. 11). According to respondents, "[h]undreds of documents outside the scope of the warrant were taken away by petitioners." (JA 19, Count I, para. 7(f)). Moreover, many of the seized documents were protected by the attorney-client privilege. *Id.*

Respondents also claim that petitioners Deakins and Sost visited respondent Monaghan's home at approximately 7:00 a.m., prior to the execution of the warrant, and solicited Monaghan's cooperation in the state's investigation. (JA 16-17, Count I, para. 2). Similarly, at approximately 9:15 a.m. (after two of the petitioners were unable to find respondent DeSantis at his home), petitioners Palentchar and Deakins visited respondent DeSantis at his place of business and solicited his cooperation. (JA 17-18, Count I, para. 4). According to the complaint, petitioners were aware that both respondents had retained counsel and continued to seek respondents' cooperation after respondents declined to cooperate, after they invoked the protection of their counsel, and after petitioners talked with counsel and agreed that further discussions would not take place. (JA 24, Count III, para. 2). In particular, respondents claim that petitioners used the threats of further investigations and the forthcoming execution of the search warrant as coercive devices designed to gain respondents' cooperation. (JA 16-17, Count I, para. 2; JA 24, Count III, para. 2). Nevertheless, respondents declined to cooperate, and petitioners left.

Although much of what transpired at the time of the execution of the search warrant remains a subject of untried controversy, at least two matters are undisputed. First, while the warrant was being executed, respondents' lawyers, Edward N. Fitzpatrick and Patrick T. McGahn, Jr., arrived at the scene. They examined the receipt of inventory supplied by petitioners, and took exception to



its adequacy. The lawyers contended that petitioners had an obligation under the laws of New Jersey to provide a more detailed inventory, listing with specificity just what was being seized. (JA 57, 60-61).

To resolve the matter, the parties placed a telephone call to Judge Lenox. The judge ordered that all seized evidence be sealed in the removal cartons, and that they were not to be opened until he could determine the adequacy of the inventory. The cartons were sealed and taken to the evidence vault at the New Jersey Division of Criminal Justice in Trenton, New Jersey, located in Mercer County, where Judge Lenox presides as the Assignment Judge. (JA 57, 61-62, 81-82; see also App. B to the Petition for a Writ of Certiorari, p. 7a; App. D, p. 34a).

The second undisputed matter pertains to the subpoenae duces tecum. As alleged in respondents' complaint (JA 19-20), at the time the search warrant was executed, three state grand jury subpoenae duces tecum were served upon respondents. The first two subpoenae called for the production of records from the two respondent corporations, Foundations & Structures, Inc., and William F. Monaghan Associates. The records requested in the subpoenae did substantially overlap those set forth in the search warrant, with the exception that the subpoenae requested documents predating September 8, 1978, whereas the search warrant authorized the seizure only of documents which postdated that date. (JA 39-44; see also App. B to the Petition for a Writ of Certiorari, pp. 7a-8a; App. D, p. 23a, note 1). Respondents later responded to these subpoenae by noting that many of the documents requested were already seized when the search warrant was executed, and by supplying additional documents which were not seized. The third subpoena (JA 45), and also a fourth served after October 5, 1984, were the subject of respondents' motion to quash which was heard before Judge Lenox on November 15, 1984. At that hearing the

state withdrew these subpoenae. (App. C. to the Petition for Writ of Certiorari, p. 8a).

Thus, the enforcement of the subpoenae was resolved by the parties, both before and during the November 15, 1984 hearing before Judge Lenox. However, the question of the adequacy of the inventory was not so easily resolved. On October 15, 1984, Deputy Attorney General Julian Wilsey, who is an attorney employed by the New Jersey Division of Criminal Justice, sent a letter to respondents' lawyers which advised them that they could send a representative to prepare a detailed list of the items seized during the execution of the search warrant on October 5, 1984. Wilsey told counsel that the state would return any items seized which exceeded the scope of the warrant, and that the state, moreover, would provide copies of the documents necessary for respondents to conduct their business affairs. On October 23, 1984, counsel and respondent Monaghan came to the New Jersey Division of Criminal Justice in Trenton, New Jersey, and were permitted to break the seals on the cartons containing the documents and to examine their contents. However, upon conducting this examination, counsel alleged that many documents were outside the scope of the search warrant, or alternatively were protected by the attorney-client or attorney work product privilege. Thus, the parties once again agreed to reseal these disputed documents, pending a judicial resolution of the propriety of their seizure. (App. B to the Petition for a Writ of Certiorari, p. 8a). As discussed below, the state court judge, Judge Lenox, concluded in a later hearing involving this matter that this resealing which occurred on October 23, 1984 could not have occurred without his initial sealing order of October 5, 1984. (JA 81). Moreover, Judge Lenox further concluded that it was the parties' intent that the judicial resolution which was to occur after this resealing was supposed to occur before him. (JA 82).

Instead, on January 3, 1985, respondents filed their civil complaint in the United States District Court for the District of New Jersey. (JA 4). Based upon the allegations which are summarized above, respondents claimed federal causes of action under 42 U.S.C. sec. 1983 premised upon illegal search and seizure (Count I), unlawful motivation for conducting the search (Count II), deprivation of the right to counsel and the right not to incriminate themselves (Count III), and illegal arrest or detention (Count VII). They also sought relief against three "John Doe" defendants who failed in their obligation to train, supervise, and coordinate the activities of the named defendants. (Count I, para. 12, 13; Count II, para. 4; Count III, para. 3; Count VII, para. 3). Relying upon pendent jurisdiction, respondents also claimed state-law causes of action, arising under the common law of New Jersey, premised upon trespass (Count IV), conversion (Count V), unlawful confinement (Count VI), and the intentional or reckless infliction of emotional distress (Count VIII). Respondents sought compensatory and punitive damages, and injunctions requiring the return of all of the documents and proscribing future tortious conduct. (JA 13-35).

Petitioners Deakins, DuBow, Palentchar and Price were served with this complaint on January 8, 1985. Petitioners Gray, Lehman, Panfile, Southwick and Sost were served on January 16, 1985. (JA 4). Accompanying the complaint, notices for taking depositions and requiring the production of documents were served upon eight of the petitioners. Specifically, some of the petitioners were instructed to make themselves available for deposition on February 13, 1985, and others were instructed to make themselves available for deposition on February 14, 1985. (JA 47). Each deponent was instructed to bring copious documents, including all documents which set forth or identified the assignments and duties of all persons involved in the October 5, 1984 search of respondent Foundations & Structures, Inc.; all documents which identified or recorded the

names of persons entering the vault or storage area where the seized records were held; all documents generally governing the procedures to be used in conducting search warrants; all documents generally governing the procedures to be used in interrogating witnesses and targets of grand jury investigations; and all documents generally describing the procedures governing the use or service of grand jury subpoenas. (JA 46-50). On January 18, 1985, petitioners served respondents with their notice of objections pertaining to irregularities in the plaintiffs' notices for taking depositions. (JA 4).

On February 1, 1985, without having submitted an answer to the complaint, petitioners filed in the district court their motion for a dismissal, premised upon abstention grounds, and for such additional relief as the court might deem appropriate. (JA 4). The respondents countered with a motion for a preliminary injunction ordering the return of the documents. (JA 4; see also App. D to the Petition for a Writ of Certiorari, p. 24a).

While this was happening, the state court proceedings were progressing. On February 19, 1985, the State of New Jersey sought and obtained an *ex parte* order from Judge Lenox requiring some of the respondents—DeSantis, Monaghan, Foundations & Structures, Inc., and William E. Monaghan Associates—to appear and show cause why the sealed documents should not be unsealed so that the state could use them for the purpose of the grand jury investigation. (JA 65).

In his *ex parte* affidavit in support of the show cause order, Deputy Attorney General Wilsey alleged that the fact that the documents were still under seal was impeding the state's criminal investigation. Wilsey also apprised Judge Lenox that

Messrs. Monaghan and DeSantis have joined in a suit presently pending in the federal district court wherein the defendants [the respondents



herein] are suing various State employees contending that their civil rights were violated as a result of the search on October 5, 1984. The defendants [respondents herein] in that action are seeking, in part, discovery of the State's criminal investigation file.

(JA 63).

The federal district court hearing on the motions occurred on March 8, 1985, three days before the state court hearing on the show cause order. At the district court hearing, the Honorable Stanley S. Brotman, U.S.D.J., reserved decision on both petitioners' motion for dismissal and respondents' motion for a preliminary injunction ordering the return of the documents. However, to maintain the status quo, the judge issued a temporary restraining order forbidding the state from unsealing the sealed documents. He also ordered that discovery in this lawsuit should be stayed pending his decision on the motions. (App. A to the Petition for a Writ of Certiorari, pp. 1a-2a).

Three days later, on March 11, 1985, the matter proceeded to Judge Lenox in the state court system. At the hearing before Judge Lenox, respondents moved for a discharge of the show cause order and relied upon two bases in support of this motion. First, respondents contended that the state's attorney, Mr. Wilsey, had failed adequately to disclose, in the *ex parte* affidavit, the nature and details of the concurrent federal litigation. (JA 71-72). Judge Lenox found this basis to be without merit. (JA 83-84).

Second, respondents contended that the state court should abstain because of the pending federal litigation. Respondents' counsel argued:

If this Court were to also assert jurisdiction over this matter and continue hearings in this matter, it would simply end up with duplicitas [*sic*] liti-

gation. It is not an efficient use of judicial resources.

(JA 74). Counsel for respondents requested the state court to abstain from the issues involving the state litigation by arguing that

[w]e are trying to avoid, Your Honor, a conflict between the State Court and the Federal Court. It is totally unnecessary. Everybody's interest is served by getting an adjudication over who has the right to possession and use of the documents that have been sealed . . . . So, it is all before the Federal Court now. We can get an adjudication there. There is no reason at this point for the State Court to intervene . . . . [W]e would urge in the interest of comity between the two judicial systems and in the interest of avoiding piecemeal and repetitious litigation that as a second basis this Court discharge the Order to Show Cause without further hearing because of the pendency of the matter before Judge Brotman.

(JA 74-75). Judge Lenox similarly rejected this ground for discharge. (JA 85-86).

Additionally, Judge Lenox took the position that the second sealing, made by the consent of counsel on October 23, 1984, was simply a continuation of the first sealing ordered by Judge Lenox on October 5, 1984, to preserve the status quo. As the judge asserted, "It was only because of that [first] sealing that anything was sealed. Absent that [first] sealing, nothing would have been sealed." (JA 81). Moreover, the judge asserted, "I would not have permitted any sealing were there not to be an application before me under that agreement." (JA 81). He continued,

[T]here was absolutely no reason why the Attorney General should not have expected that you would be coming before me [after the second



sealing]. You did not tell them that you were going to the United States District Court. You knew what you were doing . . . . The records were seized by the Attorney General under an order of this Court and it is to be expected that you would come back to this Court. If you intended to go somewhere else, then you should have told them . . . . " (JA 82).

Having failed to convince the state court to abstain, counsel for respondents then suggested that respondents might "broaden [their] application in State court to include the return" of other documents which were "not under seal." (JA 90). Judge Lenox noted that the instant show cause proceedings, filed by the state, pertained only to documents under seal, and "[y]ou are not going to broaden the issue on this Order to Show Cause because the Order to Show Cause frames the issue." (JA 92). Judge Lenox instructed respondents that in order to broaden the issues in the manner suggested by counsel, they should file a motion under New Jersey Court Rule 3:5-7. (JA 91).<sup>1</sup> The court terminated the proceedings by instructing both counsel to file briefs on the merits of the show cause order and instructing counsel to return to court at a later date. (JA 93).

A second hearing occurred before Judge Lenox on March 25, 1985. At that hearing the judge ordered that respondents would be permitted to make copies of any documents kept under seal. (App. B. to the Petition for a Writ of Certiorari, p. 15a). The parties sent the federal judge, Judge Brotman, copies of the transcripts of the state court proceedings so that he could use them in rendering his decision. (See, *e.g.*, App. B to the Petition for a Writ of Certiorari, p. 12a, footnote).

<sup>1</sup> The transcript notes that the judge referred to "Rule 4:5-7." This was an obvious typographical error.

On August 8, 1985, Judge Brotman issued his order and opinion denying respondents' request for preliminary injunction and dismissing their complaint. (App. B. to the Petition for a Writ of Certiorari). As of that date, respondents had not elected "to pursue their right to petition [the state judge] for a swift determination as to the status of the contested documents." (App. B to the Petition for a Writ of Certiorari, p. 15a). On December 30, 1985, respondents DeSantis and Monaghan were formally informed that they were targets of the state grand jury investigation. (App. D to the Petition for a Writ of Certiorari, p. 37a).

On July 31, 1986, the United States Court of Appeals for the Third Circuit, by a majority opinion, reversed the district court and held that the abstention doctrine was inapplicable to the instant case where respondents (targets of a state grand jury investigation) seek return of seized property. (App. D to the Petition for a Writ of Certiorari). The court reversed the dismissal of the complaint, but affirmed the denial of the preliminary injunction. The court held that even if abstention had been proper, the district court should have stayed, rather than dismissed, respondents' claim for money damages. The Honorable Arlin M. Adams, U.S.C.J., concurred as to the affirmance of the denial of the preliminary injunction and the reinstatement of the complaint insofar as it sought money damages, but strongly dissented as to the abstention issue and the majority's judgment that the matter should be remanded for a trial on respondents' claim for the return of grand jury documents. (App. D to the Petition for a Writ of Certiorari, pp. 16, 20-27).

On August 14, 1986, petitioners petitioned for an en banc rehearing of the majority's reversal of the district court order regarding the return of the grand jury documents. This petition was denied in an order filed August 29, 1986 (App. E to the Petition for a Writ of Certiorari).

and again in an amended, substitute order filed September 4, 1986. (App. F to the Petition for a Writ of Certiorari).

Although it is not part of the record, this Court should be aware that on September 10, 1986, the state grand jury returned an indictment against some of the respondents, namely, William Monaghan, Theodore DeSantis, Foundations & Structures Inc., as well as other criminal defendants not parties to the instant federal action. However, an active investigation is still continuing, and further indictments may be returned. (See App. A to the Petitioners' Reply Brief, filed January 20, 1987).

On January 27, 1987, this Court granted the petitioners' Petition for a Writ of Certiorari.

#### SUMMARY OF ARGUMENT

1. The majority opinion in the circuit court conceded that respondents had available state procedures by which, without waiting to be indicted, they could immediately seek a state court adjudication of their demand for the return of documents which, they alleged, were improperly seized (App D to the Petition for a Writ of Certiorari, pp. 30a to 31a and note 7). Moreover, the record demonstrates that the documents which were to be used in a state grand jury investigation were seized pursuant to a warrant issued by the state court judge who supervised the grand jury. At the time of the search respondents disputed the adequacy of the receipt which the state was preparing concerning the seized documents. When contacted by the parties at respondents' demand, the judge stated that the documents should be sealed and that an application for unsealing should be made before him. The parties later disagreed as to whether some of the documents were improperly seized and whether the state's retention of these documents violated the attorney-client privilege. These documents were also sealed. The state judge found that this sealing would not have occurred absent his previous order

to seal documents and to appear before him concerning the unsealing of the documents. It is thus clear that this dispute stemmed from an ongoing state grand jury proceeding, that the respondents had an available state forum in which to resolve their dispute, and that the use of this forum was initiated by respondents and expected by the state judge. Nevertheless, the circuit court concluded abstention was not permitted. The court held that for *Younger* abstention to apply [*Younger v. Harris*, 401 U.S. 37 (1971)], the state grand jury itself would have to be the forum in which respondents could obtain the relief they sought. Since the grand jury, being an *ex parte* proceeding, could not provide this relief, it followed, according to the court, that *Younger* abstention must fail. The fact that relief was available from the state court which issued the warrant and which supervised the grand jury was deemed to be irrelevant. The court stated, "[I]n no case has the Supreme Court or this court ever turned the propriety of a *Younger* dismissal upon the mere availability of a State judicial proceeding." (App. D. to the Petition for a Writ of Certiorari, pp. 30a to 31a).

This statement, quite simply, is wrong. This Court has done precisely what the circuit court said it has not done in several opinions, including the recent opinion in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, — U.S. —, 106 S.Ct. 2718 (1986), which the majority opinion did not cite, and upon which the dissenting opinion relied. It is thus clear that the circuit court's opinion is in error. Moreover, abstention from the equitable portion of respondents' complaint is consistent with, and indeed compelled by, *Younger* and its progeny, a conclusion reached by every other court that has addressed the first question presented for review.

2. Petitioners' argument concerning the second question presented for review assumes the *Younger* doctrine applies if the federal complainants may seek redress from the state court which supervised the grand jury and issued



the warrant whose execution led to the state's seizure and possession of the documents which the targets seek to regain. Under this assumption, petitioners submit that the district court has discretion, in appropriate cases, to dismiss an ancillary claim for damages when it properly applies the *Younger* doctrine to the equitable portion of the 42 U.S.C. sec. 1983 action. Although the *Younger* decision, like the *Pullman* decision [*Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941)] and the *Burford* decision [*Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)] purported to rest, in part, upon the special limitations and powers of courts of equity, subsequent caselaw has demonstrated that these abstention doctrines in fact rest upon principles of comity and therefore have application to suits for money damages. The district court's decision whether to dismiss, or simply to stay, the ancillary claim for damages when it dismisses the equitable portion of a 42 U.S.C. sec. 1983 action rests "on a careful balancing of the important factors as they apply in a given case." *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 16 (1983).

Several factors supported dismissal in this case. Even if a stay had been granted, the pendency of the damages claim would have hovered over the state officials' investigation of respondents' criminal conduct. Moreover, respondents may well have sought a lifting of the stay premised upon their allegation that the state had been dilatory in its grand jury investigation. The doctrine of eleventh amendment sovereign immunity as explicated by this Court's opinion in *Pennhurst State School Hosp. v. Hilderman*, 465 U.S. 89 (1984) would have foreclosed federal court litigation of respondents' claims premised upon state law. Additionally, respondents' federal claims for damages are integrally dependent upon and inextricably interconnected with questions of state law. These several factors sufficed to uphold the district court's decision to dismiss, rather than to stay, the claims for damages.

## LEGAL ARGUMENT

### POINT I. THE THIRD CIRCUIT ERRED IN REVERSING THE DISTRICT COURT'S DECISION TO ABSTAIN.

Respondents, the subjects of a state grand jury investigation, filed a 42 U.S.C. sec. 1983 action demanding, *inter alia*, the return of property seized pursuant to a search warrant. Referring both to state law which provided a mechanism for obtaining the return of illegally seized property, and also to the state judge who supervised the grand jury, issued the warrant, and explicitly invited respondents to invoke that mechanism, petitioners requested abstention under *Younger v. Harris*, 401 U.S. 37 (1971). The third circuit, over a strong dissent, reversed the judgment of the district court and ruled that abstention was not permissible. Petitioners' motion for a rehearing on the very issue raised in the first point of this brief was denied by a vote of six to four. The decision of the third circuit is in conflict with the decisions of at least two other circuits and with the decisions of this Court in *Younger* and its progeny.

In *Younger v. Harris*, *supra*, this Court held that a federal court should abstain from enjoining or interfering with a pending state criminal prosecution. The holding was based, in part, upon the rationale that federal-court interference with pending state proceedings is inconsistent with principles of federalism and comity, which reflect "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. at 44.

The full scope of the abstention doctrine has been explicated in a number of cases over the years since *Younger* was decided. See, e.g., *Ohio Civil Rights Comm'n v. Dayton*



*Christian Schools, Inc.*, — U.S. —, 106 S.Ct. 2718 (1986) (applying abstention in deference to state administrative tribunal adjudicating employment discrimination claims); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (applying abstention to state bar disciplinary proceedings); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (applying abstention in favor of a civil action by the state to recover wrongfully-obtained welfare benefits); *Juidice v. Vail*, 430 U.S. 327 (1977) (applying abstention where federal plaintiff is involved in state court contempt proceedings as judgment debtor); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (applying abstention in deference to civil nuisance action brought by county officials against theatres showing pornographic film). Clearly, the *Younger* doctrine has not received a miserly construction.

Three conditions, if met, are sufficient to invoke the *Younger* doctrine: (1) that there are ongoing state judicial proceedings; (2) that the ongoing state judicial proceedings implicate an important state interest; and (3) that there is an adequate opportunity in the ongoing state proceeding to raise constitutional challenges. See *Middlesex County Ethics Committee*, 457 U.S. at 432. The first and second of these conditions are clearly met in the case. The controversy centers upon the third, which petitioners contend has also been met.

With respect to the first condition: under federal law, grand jury proceedings are judicial proceedings. *Levine v. United States*, 362 U.S. 610, 617 (1960); *Cobbledick v. United States*, 309 U.S. 323, 327 (1940); *Ex Parte Young*, 209 U.S. 123, 163 (1908). As the district court recognized (App. B to the Petition for a Writ of Certiorari, pp. 12a, 16a), this is equally true under state law. E.g., *In re Petition to Compel Testimony of Tusio*, 73 N.J. 575, 587, 376 A.2d 895, 900 (1977) (Pashman, J., dissenting); *State v. Smith*, 102 N.J. Super. 325, 336, 246 A.2d 35, 41 (Law Div. 1968), *aff'd* 55 N.J. 476, 262 A.2d 868 (1968), *cert.*

*den.* 400 U.S. 949 (1970); *In re Jeck*, 26 N.J. Super. 514, 519, 98 A.2d 319, 321 (App. Div. 1953), *certif. den.* 13 N.J. 429, 100 A.2d 215 (1953). Indeed, it is well established that a grand jury proceeding is considered a pending state action for purposes of *Younger* abstention. See *Kaylor v. Fields*, 661 F.2d 117 (8th Cir. 1981); *Notey v. Hynes*, 418 F. Supp. 1320, 1326 (E.D.N.Y. 1976).<sup>2</sup>

With regard to the second condition: grand jury proceedings do implicate an important state interest, namely the investigation of criminal conduct and the indictment of alleged wrongdoers. The state's interest in the unhindered enforcement of its criminal laws has been repeatedly recognized by this Court in *Younger* itself (401 U.S. at 43-46) and, in cases which have relied on *Younger*, as a state interest deserving of the greatest deference. See, e.g., *Trainor*, 431 U.S. at 443; *Hoffman*, 420 U.S. at 604-605. See also *State v. Doliner*, 96 N.J. 236, 250-251, 475 A.2d 552, 560 (1984).

It is the third condition which was not present in this case according to the majority opinion of the circuit court. The court erroneously concluded that respondents did not enjoy an adequate opportunity in the ongoing state judicial proceedings to raise their constitutional challenges.

Initially, there can be no dispute that state law afforded respondents mechanisms by which they could obtain relief. In fact, these mechanisms have been invoked. By statute and by court rule, the Superior Court assignment judge, Judge Lenox, supervises the state grand jury. New Jersey Court Rule 3:6-11(b). Respondents knew to turn to Judge Lenox when they had a dispute over the adequacy of the inventory, and they obtained relief. Respondents knew to

<sup>2</sup> The only caveat to this general rule is that there must be a state forum in which recourse is available. *Brennick v. Hynes*, 471 F. Supp. 863, 867 (N.D.N.Y. 1979). As will be discussed below there is a state forum in which recourse is available in this case.

turn to Judge Lenox when they sought to quash subpoenas, and they again got relief. With respect to the demand for the return of documents, Judge Lenox invited respondents to file a motion under New Jersey Court Rule 3:5-7.<sup>3</sup> Instead, at this point in the proceedings, they decided to bring this portion of the action to the federal courts.

The third circuit clearly found that the relief which respondents sought—return of their property—could be obtained in state court. (App. D to the Petition for a Writ of Certiorari, p. 31a note 7). Thus, the issue disturbing the majority of the third circuit was not the adequacy of the relief under state law. Rather, it was whether there were ongoing proceedings “in which” relief was technically available. (App D to the Petition for a Writ of Certiorari, p. 29a).

The court concluded that for the third condition to be met, the relief must be available from the grand jury itself. The court noted that “[a] grand jury proceeds *ex parte*” and does not have “the authority to adjudicate anything.” (App. D to the Petition for a Writ of Certiorari, p. 30a). By this crabbed interpretation of the third condition, the court concluded that *Younger* abstention was inappropriate.

The circuit court clearly erred. Its concern that the state grand jury itself cannot litigate respondents’ fourth amendment claims is of no moment. Plaintiffs in *Ohio Civil Rights Comm’n* expressed the same concern with respect to the Ohio Civil Rights Commission. This Court responded that “it is sufficient . . . that constitutional claims may be raised in state court judicial review . . . .” *Id.* at 2724. Thus, as

<sup>3</sup> The majority opinion of the circuit court purported to harbor uncertainty as to whether an action under this rule or an action in the nature of replevin was the appropriate mechanism for obtaining the relief which respondents sought, namely the return of documents. (App. D to the Petition for a Writ of Certiorari, p. 31a note 7).

Judge Adams noted in his dissent below, this Court’s holding in *Ohio Civil Rights Comm’n* emphasized that “even if the administrative proceedings would not provide a forum for resolution of constitutional claims, state judicial review of any agency decision would be sufficient for protection of any constitutional interests.” (App. D to the Petition for a Writ of Certiorari, p. 38a). This holding fully applies to this case and is directly at odds with the circuit court opinion. It must also be remembered that in this case a motion could have been made before and was actually invited by the very judge who signed the search warrant and who presides over the state grand jury.

Under the rationale of the circuit court, intervention of federal courts into state grand jury investigations would always be required at the will of those under investigation any time a search has occurred in the course of that investigation. Grand jury proceedings are, by their very nature *ex parte* proceedings. Grand juries do not have the ability or the authority to adjudicate federal claims made by those who are touched by their investigations. This is the very reason that a judge is required by New Jersey law to supervise the grand jury. See New Jersey Court Rule 3:6-11(b). To hold that this inability to adjudicate claims requires the federal courts to become involved in matters intricately related to grand jury investigations promotes form over substance and ignores comity. It makes little difference whether the grand jury itself decides the claim or the court which supervises the grand jury makes the adjudication. In either event those aggrieved by the investigation have recourse to state judicial review. In a system in which the grand jury operates as an arm of the court [(*State v. Haines*, 18 N.J. 550, 557, 115 A.2d 24, 28 (1955))] there is no reason to hold that a motion made before the court which is charged with supervision of the grand jury is outside the grand jury proceeding.

This is particularly true in a case such as that presently before the Court. Respondents have requested the return



of documents seized pursuant to a warrant. In large measure, respondents' assertions amount to a claim that the state has possession of documents which it should not have been allowed to seize. Although the search was conducted in connection with a grand jury investigation, the grand jury did not empower the search—the search was authorized by the court which oversees the grand jury. The interests of comity are ill served by ruling that recourse to that same court does not provide an adequate forum for relief. Any action taken by the grand jury can be contested before the judge who supervises it. Certainly the actions taken by the judge in his role as overseer of the grand jury are not so divorced from the grand jury as to be considered outside the pending state action for purposes of *Younger* abstention.

As to the possible claim that grand jury proceedings are not judicial in nature, it should be noted that this Court has applied *Younger* in administrative proceedings [(*Gibbons v. Berryhill*, 411 U.S. 564, 576-577 (1973))] and even lawyer disciplinary proceedings which were within the appellate jurisdiction of the state courts. *Middlesex County Ethics Committee, supra*. Similarly, the grand jury is an arm of the court and grand jury actions are immediately subject to judicial review. The function and nature of a grand jury proceeding, combined with the fact that the grand jury is subject to the supervision and control of the courts suffices for purposes of *Younger* abstention. While the hearing itself is not adversarial, any action taken by the grand jury is immediately subject to full adversarial review by the court.

It is worthy of note that this Court has found that the state courts are sufficiently adept in ruling on claims relating to searches and seizures that their determinations in this regard should not be reviewed by the federal courts in *habeas corpus* actions. *Stone v. Powell*, 428 U.S. 465 (1976). It would be anomalous to hold that even though a post-conviction federal review of state court fourth amend-

ment decisions would unnecessarily violate the tenets of federalism, comity permits federal rather than state review of fourth amendment claims at the pretrial stage. Fortunately such a result is not required by *Younger*.

Instructive in this regard is the recent opinion of the United States Court of Appeals for the Fourth Circuit in *Potomac Electric Power Company v. Sachs et al.*, 802 F.2d 1527 (4th Cir. 1986), which is in direct conflict with the third circuit's opinion in the present case. In that case the plaintiff Potomac Electric Power Company (hereinafter referred to as "PEPCO") sought a declaratory judgment that the federal Toxic Substances Control Act preempted Maryland law. However, in the district court it was established that the State of Maryland had initiated a grand jury proceeding to investigate whether plaintiff PEPCO had violated Maryland's criminal laws and regulations governing hazardous waste disposal. It was further established that these proceedings were in progress at the time the district court action was filed. The district court refused to abstain because of its conclusion that there was no adequate opportunity for the plaintiff PEPCO to raise its preemption claim before the grand jury. Moreover, since it was possible that PEPCO would not be indicted, the district court concluded that it was possible that PEPCO would never be able to present its federal claim in state court. The United States Court of Appeals for the Fourth Circuit disagreed noting that this Court's opinions

demonstrate that not only is the immediate proceeding relevant in determining whether there is an opportunity to present a federal claim, but subsequent state judicial proceedings in which the claim can be raised are also relevant. Grand jury investigation and indictment initiate a criminal prosecution in Maryland's system of criminal enforcement. If indicted, PEPCO can present its claim of federal preemption . . . as a defense to the criminal prosecution, and therefore has an



adequate opportunity to present the claim in the ongoing proceedings.

*Id.* at 1532 (footnote omitted).

The abstention holding adopted by the court in *Potomac Electric Power Company* is not unique. On the contrary, the third circuit stands virtually alone among those courts which have addressed the issue whether the *Younger* abstention doctrine should apply to state grand jury proceedings. For example, in *Kaylor v. Fields*, the court was faced with a situation in which plaintiffs had brought suit under 42 U.S.C. sec. 1983 to enjoin a state prosecutor from enforcing subpoenae he had issued pursuant to a state investigation. The court first noted that *Younger* prohibits federal courts from interfering with state criminal proceedings. The court then ruled that since under Arkansas law a prosecutor takes the place of a grand jury, the issuance of the subpoena was part of a state criminal action. Since plaintiffs had the opportunity to present their claims in relation to this proceeding in the state courts, abstention was required. *Kaylor*, 661 F.2d at 1181-1182.

The *Kaylor* court cited with approval the decision in *Notey v. Hynes*, *supra*. In *Notey* the court, reviewing requests for injunctive and declaratory relief in regard to a matter which was then pending before a state grand jury, stated:

In other words, when a grand jury has been impanelled and is sitting and investigating, there is a "criminal case" and in New York a criminal proceeding, and most significantly there is the State court responsible for and having jurisdiction of such grand jury from which relief from constitutional abuses may be obtained. Interference with such state criminal proceedings would appear clearly to be within the prohibitions contemplated by *Younger* and its progeny.

*Notey v. Hynes*, 418 F. Supp. at 1326. See also *Craig v. Barney*, 678 F.2d 1200 (4th Cir. 1982), *cert. den.* 459 U.S. 860 (1982); *Law Firm of Daniel P. Foster v. Dearie*, 613 F. Supp. 278, 280 (E.D. N.Y. 1985).

Thus, the third circuit's opinion in this case is contrary to the general rule that grand jury proceedings are pending state proceedings for the purposes of *Younger* abstention.

In ruling that grand jury proceedings do not suffice for purposes of *Younger* abstention the third circuit majority also incorrectly held that the district court was required to disregard all post-complaint state court proceedings. (App. D to the Petition for a Writ of Certiorari pp. 31a-32a.) This conclusion which will impact on many, if not most, cases involving continuing criminal investigations is flawed both factually and legally. As Judge Adams, noted, in dissent, the post-complaint proceedings were actually a continuation of proceedings which began on the day of the search, prior to the filing of the complaint, (See p. 11 *supra*). Thus, the majority opinion is factually wrong.

The opinion also ignores the principle of law repeatedly endorsed by this Court that federal courts considering *Younger* abstention issues may consider proceedings which take place after the filing of the complaint provided that no substantial advancement in the federal action has taken place. *Ohio Civil Rights Comm'n v. Dayton*, 106 S.Ct. at 2723 n.2; *Middlesex County Ethics Committee*, 457 U.S. at 436-437; *Hicks v. Miranda*, 422 U.S. 332, 349 (1975). Indeed in *Middlesex County* this Court specifically took into account state court proceedings initiated subsequent to the filing of the federal complaint in determining whether respondent had an adequate state forum. 457 U.S. at 436-437.

In *Hicks v. Miranda*, 422 U.S. 353 (1975), this Court was presented with a situation in which no criminal proceedings were pending against appellees when their federal

complaint was filed. Rather, the only charges which had been filed at that time were against employees of the appellees. Nevertheless this Court noted that there had been proceedings in the state courts concerning the validity of the search and seizure at issue and that federal action would interfere with pending state prosecutions which had earlier been filed against the employees and those which were filed against appellees after the institution of their federal suit.

The *Hicks* Court then ruled that the institution of state proceedings after the filing of the 1983 action but before the proceedings of substance had taken place in the federal courts invoked *Younger*. 422 U.S. at 348-350. Further, the Court stated:

Absent a clear showing that appellees could not seek the return of their property in the state proceedings and see to it that their federal claims were presented there, the requirements of *Younger v. Harris* could not be avoided on the ground that no criminal prosecution was pending against appellees on the date the federal complaint was filed.

*Id.* at 349.

This case demonstrates that proceedings which take place after the filing of a federal complaint can be considered for purposes of *Younger* abstention where these proceedings concern an investigation which is in progress prior to the filing of the complaint. It also made clear that *Younger* abstention may be invoked even if the subjects of a criminal investigation have not specifically been named in an adversarial proceeding. *Hicks* merely required that the federal litigants must have a substantial interest in the pending proceedings and that they must have an available state forum for litigation of their federal claims.

As in *Hicks*, respondents in the present case obviously have an interest in pending proceedings since their prop-

erty was seized and they were and are the subjects of a grand jury investigation. As in *Hicks*, the state court rules and the subsequent proceedings make clear that a state forum was readily available. To ignore the availability of the state forum and the subsequent proceedings in this forum merely because the investigation was at the grand jury stage does violence to the reasoning behind *Younger* and *Hicks*. Succinctly stated, at the date their respective federal suits were filed the *Hicks* appellees had much less involvement in any pending action than did the present respondents.

The state's interest in the unhindered enforcement of its criminal laws will be seriously disrupted if the majority opinion of the lower court is permitted to stand. Federal court involvement on behalf of disgruntled subjects of state grand jury investigations will constitute both an undue interference with and an immense burden upon New Jersey's interest in investigating criminal conduct within its borders. Nowhere are the interests of comity greater and nowhere is the *Younger* abstention doctrine more needed than in the area of pending criminal investigations. Still, the third circuit's opinion virtually eliminates the possibility of abstention in this situation. The circuit court's decision should be reversed so that the federal courts may defer to the state courts with respect to the conduct of this important function.

## **POINT II. THE DISTRICT COURT HAD DISCRETION EITHER TO DISMISS OR TO STAY THE CLAIM FOR MONEY DAMAGES.**

If this Court agrees that abstention was appropriate, the question remains as to the appropriate disposition in the district court. The district court determined that the entire complaint should be dismissed. The circuit court concluded that, if abstention were applicable, then the district court would have been mandated to stay and had no discretion to dismiss respondents' claim for money dam-



ages. Contrary to the circuit court's holding, petitioners submit that the district court does have some discretion on this question and that the third circuit should have affirmed the district court's decision to dismiss. Succinctly stated, respondents must pursue all of their remedies in the state court system.

The courts of New Jersey provide a forum for suits premised upon 42 U.S.C. sec. 1983 and will award attorneys fees to successful plaintiffs. See, e.g., *Right to Choose v. Byrne*, 91 N.J. 287, 314-318, 450 A.2d 925, 939-941 (1982); *Carmel v. Hillsdale*, 178 N.J. Super. 185, 428 A.2d 548 (App. Div. 1981). In *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116-117 (1981), this Court considered the willingness of the state court system to entertain such suits when it ordered the plaintiffs to proceed in the state, rather than the federal court system. Significantly, the courts of New Jersey also provide a forum for respondents' claims against the state officers premised upon state tort principles. Indeed, the state courts, from respondents' perspective, provide a superior forum to the federal courts, because the state has, in certain broadly defined circumstances, waived sovereign immunity for its vicarious liability occasioned by its agents when the lawsuit is brought in state court under the New Jersey Tort Claims Act, N.J. Stat. Ann. sec. 59:1-1 *et seq.* (West 1982). See N.J. Stat. Ann. sec. 59:2-2(a). In sum, the district court judge, Judge Brotman, was certainly correct when he concluded that "[a]ll state law claims raised by plaintiffs [respondents herein] can, of course, be pursued in [the state] forum." (App. B to the petition for a Writ of Certiorari, p. 17a). The question remains whether the district court could seek to compel respondents to utilize that forum.

At the outset, petitioners note that this Court has deemed it to be an open question whether *Younger* may apply to a lawsuit in which *only* money damages are sought. *Juidice v. Vail*, 430 U.S. 327, 339 n.16 (1977); see

also *Tower v. Glover*, 467 U.S. 914, 923 (1984). This case does not fall within this open question because respondents sought both money damages and (primarily) equitable relief. Nevertheless, the *Younger* decision, like the *Pullman* decision [*Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941)] and the *Burford* decision [*Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)] purported to rest in part upon the special limitations and powers of courts of equity. For example, the plaintiff in *Younger* did not receive the injunction he wanted because he could not meet the "traditional prerequisite to obtaining an injunction," including the requirement of irreparable injury, due to lack of an adequate remedy under state law. *Younger*, 401 U.S. at 46. *Pullman* and *Burford* abstention had similar rationales premised upon the equitable nature of the relief which the plaintiffs sought. *Pullman*, 312 U.S. at 500-501; *Burford*, 319 U.S. at 332-334.

However, "[t]his link between equity and the Court's rules [concerning the various abstention doctrines] was tenuous even in the early abstention cases. As the rules have evolved, the Court has relied less and less on equity and instead has stressed values of federalism as the basis of these doctrines." Wells, *Why Professor Redish Is Wrong About Abstention*, 19 GEORGIA L. REV. 1097, 1108 (1985). For example, this Court, upon at least two occasions, ordered *Pullman* abstention where plaintiffs sought only damages, and not injunctive relief. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970); *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962). In *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), this Court met the contention that the absence of a request for injunctive relief distinguished the case from *Pullman* by pointing out that the issues of federalism were just as significant in that case as in cases involving requests for injunctions. *Id.* at 28. In *Alabama Public Service Comm'n v. Southern Railway*, 341 U.S. 341 (1951), this Court invoked *Burford* abstention and premised its holding pri-



marily upon the "rule of comity." *Id.* at 350. In *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 431-432 (1982), this Court's invocation of *Younger* abstention rested exclusively upon considerations of comity, and not equitable restraint. Similarly, in *Fair Assessment in Real Estate Ass'n v. McNary*, *supra*, this Court's invocation of abstention did not at all rely upon equitable principles. Rather, this Court relied upon "the principle of comity." 454 U.S. at 107, 110, 111, 113, 116. This Court emphasized that the *McNary* principle was not limited to tax cases (the *McNary* plaintiffs had sued for the collection of state taxes already paid) by quoting extensively from *Younger*, where comity received "[i]ts fullest articulation." *Id.* at 111-112.

Consistent with this reasoning, and as noted by the district court in this case (App. C to the Petition for a Writ of Certiorari, p. 14a), many lower courts have held that *Younger* applies in damages cases. *Mann v. Jett*, 781 F.2d 1448 (9th Cir. 1986); *McCurry v. Allen*, 606 F.2d 795, 799 (8th Cir. 1979) (staying the action for money damages), *rev'd.* on other grounds, 449 U.S. 90 (1980); *Martin v. Merola*, 532 F.2d 191, 195 (2nd Cir. 1976) (dismissing the complaint for damages but allowing plaintiffs to refile after the state proceedings were accomplished); *Guerro v. Mulhearn*, 498 F.2d 1249, 1253 (1st Cir. 1974) (whether to dismiss the damages claim depends upon the facts of the case); *Conover v. Montemuro*, 477 F.2d 1073, 1080 (3rd Cir. 1973); *accord Sartin v. Commissioner of Public Safety of the State of Minnesota*, 535 F.2d 430, 433-434 (8th Cir. 1976); *cf. Carras v. Williams*, 807 F.2d 1286, 1292 (6th Cir. 1980) (abstention from damages portion of suit is inappropriate "[i]n the absence of a vital state interest in the underlying proceeding"). Nevertheless, the question remains whether application of *Younger* afforded the district court discretion to dismiss, rather than to stay.

In resolving this question, it is helpful to consider the general standards by which a district court should determine whether to dismiss a federal suit out of deference to parallel litigation brought in state court. This Court recently addressed this question in *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (1983). The decision whether to dismiss is addressed "to the discretion of the district court in the first instance." *Id.* at 19. Moreover, "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case . . . ." *Id.* at 16. In *Moses H. Cone* this Court held that "the balance [should be] heavily weighted in favor of the exercise of jurisdiction," *id.*, but that holding was premised in part upon the conclusion that "none of [the three categories of abstention] applied to the case at hand," and thus "considerations of state-federal comity" were absent. *Id.* at 14. In this case *Younger* abstention applies, and the balance does not weigh in favor of the exercise of jurisdiction. Moreover, the *Younger* concerns for comity, which were absent in *Moses H. Cone*, are fully present in this case and implicate the most significant factors supporting the district court's dismissal.

Most significant, the pendency of the damages claim, even if it had been stayed, would have hovered over and disrupted the state's investigation of respondents' criminal conduct. This disruption would have resulted from respondents' return to the district court to seek a lifting of the stay premised upon their allegation that the state was dilatory in its grand jury investigation and had retained their documents for too long a period of time, and that the stay should be dissolved.

Respondents have contended, and the majority opinion of the circuit court suggested, that the state may have engaged in dilatory tactics in investigating respondents'

criminal conduct.<sup>4</sup> Absolutely nothing in the record supports this contention, but respondents' concerns over the possible tardiness of the state's investigation are at least hypothetically valid. It is imperative that some judicial official should be available who can supervise the grand jury proceedings, measure their progress, and afford relief to those affected if delays in the proceedings are providing too onerous a burden upon targets and others involved in the investigation. For example, if documents taken by subpoena are retained for too long a period of time, some judicial officer, charged with the oversight of the grand jury, must be available to order that the documents must be returned to the persons from whom they were taken.

In New Jersey that oversight, with respect to state grand jury investigations, is provided by the state assignment judge (in this case, Judge Lenox) designated by the Chief Justice of the New Jersey Supreme Court. See New Jersey Court Rule 3:6-11(b). Judge Lenox provides that oversight both generally, through his power to supervise the grand jury (N.J. Stat. Ann. sec. 2A:73A-6 (West 1976); New Jersey Court Rule 3:6-11(b)) and also in specific ways. For example, if the Attorney General seeks a continuance of the state grand jury's normal term, he must convince Judge Lenox "of the necessity therefor" and must persuade the judge "that the grand jury has not completed its labors." New Jersey Court Rule 3:6-10(a).

If the district court judge had entered a stay, rather than a dismissal, then he, like Judge Lenox, would have

<sup>4</sup> As of the date of the filing of the circuit court opinion, none of the respondents had been indicted. The majority opinion of the circuit court noted this fact and complained that for a period of 18 months, the state had retained possession of the seized documents without charging respondents with criminal conduct. (App. D to the Petition for a Writ of Certiorari, pp. 20-21 and note 4). The majority opinion concluded that respondents' claims should not be left "in perpetual limbo." (*Id.* at p. 33a, note 9). Some of the respondents have now been indicted.

become enmeshed in the job of supervising the reasonable progress of this very complex criminal investigation. As time proceeded, respondents would surely have returned to the district court seeking a lifting of the stay. All of the choices confronting the district court judge, at that point, would have had a serious impact upon the interest of comity.

The district court judge could have deferred to the state judge, who was already familiar with the charges, having issued the warrant, ordered the sealing of the seized documents and reviewed respondents' motion to quash two of the subpoenae. See *Moses H. Cone*, 460 U.S. at 15, 21 (one factor in the district court's decision to defer to parallel state litigation is which court first assumed jurisdiction over the property). However, deference to the state judge would not be completely satisfactory. Since the civil complaint would be in the federal court, rather than the state court, the state judge's supervision of the grand jury investigation would not have included consideration of the complaint. A judge, in considering the civil complaint, might, for example, conclude that without unduly harming the state's criminal investigation, the complaint could proceed at least through certain limited stages of discovery, so long as protective orders fully shielded the underlying substance of the grand jury investigation. The district court judge might thus choose to determine for himself how the civil litigation should proceed, but it is obvious that that determination, no matter how carefully it was made and how fully it was accompanied by protective orders limiting discovery and other mischief by which plaintiffs could impede upon the criminal investigation, could adversely affect the criminal investigation and negatively impact upon the interest of comity.

Moreover, the mere process of the determination would have a negative impact upon the interest of comity. The district court judge's investigation of the state grand jury's progress would necessitate intrusion into the state grand



jury process and might necessitate testimony from prosecutors and, possibly, witnesses. If that testimony were available to the plaintiffs, it might ruin the state's criminal investigation. More likely the judge would conduct his investigation *ex parte*, and would foreclose the plaintiffs from obtaining it. In a complex case such as this, the *ex parte* nature of the proceeding would enhance the district court judge's already difficult task, and it might enhance the district court's burden upon the state prosecutors as they attempted to apprise the judge concerning the details of the criminal investigation. All in all, the district court judge was well within his discretion to conclude that the entire complaint should be pursued in the state courts, where a state judge was already assigned to supervise the grand jury and, if necessary, to determine its progress.

Other factors peculiar to this case favor dismissal rather than a stay. A significant portion of respondents' complaint sought damages from state officials, acting under color of state law, for their alleged commission of state torts. These claims are foreclosed from adjudication in the federal courts by virtue of the doctrine of *Pennhurst State School Hosp. v. Hilderman*, 465 U.S. 89 (1984). Under the *Pennhurst* doctrine "a plaintiff with both state and federal claims against a state official no longer is able to seek relief for those claims in federal court." Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y. UNIV. L. REV. 1, 24 (1985). Since respondents were able to obtain at most partial relief in the federal courts, it was appropriate for the district court to send them into the state court system where they could obtain full relief.

In this regard, the second circuit has held that a district court should normally not abstain because of parallel state court litigation if the plaintiff raises a claim for which the federal courts have exclusive jurisdiction. *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59, 63 (2d Cir. 1986). This case essentially presents the reverse of the

\* *Andrea* doctrine. That is, a federal court is well advised to abstain if the plaintiff raises a claim for which the state courts have exclusive jurisdiction. "Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed . . . where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 495 (1942).

Of course, if respondents had been willing to abandon their state tort claims, the situation might have been different. However, these respondents have shown no inclination to abandon those claims. Rather, respondents have continued to press these claims as they argued in the district court, in the circuit court, and apparently, in this Court that the *Pennhurst* doctrine does not foreclose adjudication of their state tort claims. See Respondents' Brief in Opposition to the Petitioner's Petition for a Writ of Certiorari, p. 23 n.5. However, respondents are wrong. As this Court noted in *Pennhurst*, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106. *Accord*, *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir. 1984); *Rogers v. Okin*, 738 F.2d 1, 3 (1st Cir. 1984).

Respondents' confusion concerning the *Pennhurst* doctrine might explain the confusion of the majority opinion in the circuit court concerning petitioners' reliance upon the *Pennhurst* doctrine. That opinion erroneously asserted that

[t]he defendants' [petitioners herein] principal contention is that the eleventh amendment, as interpreted by the Supreme Court in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 97-124 (1984), bars the district courts from awarding damages against them individually, even



with respect to alleged violations of the Federal Constitution. The state officials neither cite any authority nor proffer any credible argument for such an extreme position, and we reject it.

(App. D to the Petition for a Writ of Certiorari, p. 26a). The circuit court may be correct that this position is extreme, but the court is wrong to claim that petitioners have ever advanced it. Petitioners did not advance this construction of the *Pennhurst* opinion in their briefs to the district or circuit court. See Brief in Support of Motion to Dismiss Made on Behalf of the Defendants, filed in the district court on February 1, 1985, p. 17 *et seq.*; Brief on Behalf of Appellees, filed in the circuit court on January 3, 1986, p. 40. Petitioners did not advance this construction in any oral argument before either court. Rather, petitioners have consistently argued, and continue to argue, that *Pennhurst* bars federal adjudication only of respondents' state tort claims.

Nevertheless, petitioners have also argued, and continue to argue, that respondents' insistence upon pressing these claims means that all claims should be adjudicated in the only court which has jurisdiction over all claims, namely the state court. This will nurture the "avoidance of piecemeal litigation." *Moses H. Cone*, 460 U.S. at 19. As respondents themselves noted in their argument (albeit in a slightly different context) before the state judge, Judge Lenox, the district court's retention of the federal claim would result in "duplicious litigation," would fail to constitute "an efficient use of judicial resources of either system" (JA 74), would strain "the interest of comity," and would negate the wisdom "of avoiding piecemeal and repetitious litigation." (JA 75). Thus, it is somewhat unfortunate that respondents have resisted the district court's proper efforts to thrust them into one forum, the state court system.

There is yet another reason, somewhat peculiar to this case, which supported the district court's decision to dismiss, rather than to stay. Respondents' claims for damages are "inextricably intertwined" with state law claims. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-483 n.16 (1983). For example, Count I of respondents' complaint seeks damages for an illegal search and seizure. (JA 16-22). Count II seek damages because the search was "unlawfully motivated." (JA 23). This portion of Count II should not survive a dismissal motion under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). More to the point, both causes of action (if, in fact, the allegations state causes of action) are largely premised upon respondents' contention that petitioners did several things which were bad. However, these bad actions were primarily violations of state law and not federal law.

One of respondents' allegations is that petitioners removed documents protected by the attorney-client or attorney work product privilege. The attorney-client and attorney work product privileges are essentially creatures of state law. It should be noted that at the time of the execution of the search, none of the respondents was under arrest, and none had been charged with or indicted for criminal conduct. Thus the right to counsel afforded by the sixth amendment had not yet attached. *Moore v. Illinois*, 434 U.S. 220 (1977). Not only does this render problematic the claim in Count III that respondents were denied their right to counsel, but it also makes clear that the attorney-client and attorney work product portion of Count I, incorporated by reference also into Count II, rested exclusively upon state law.

Respondents also alleged that the search was illegal because they "were not given a complete and proper return and inventory as is required under the laws of the State of New Jersey." (JA 20, Count I, para. 11). They further complained that petitioners brought a blank subpoena with them which they (and not an attorney) filled in as the

search progressed. (*Id.* para. 9). Whether the return and inventory were adequate and whether persons who are not attorneys may draft subpoenae are obviously questions of state law which are inextricably intertwined with respondents' federal complaint.

Questions arising under state law concerning the service of subpoenae, and the consequences of failing to move to quash a served subpoena, are further implicated in respondents' complaint. Count I alleged that petitioners removed documents which were beyond the scope of the warrant. In the proceedings before Judge Lenox, respondents charged that petitioners had removed documents predating September 8, 1978, and the search warrant covered only documents after this date. (JA 70). However, at the time of the warrant's execution, petitioners served respondents with subpoenae demanding documents which predated September 8, 1978. Respondents did not move to quash these subpoenae; rather they complied by noting that many of the requested documents were already in the state's possession, having been seized at the time of the warrant's execution, and by supplying additional documents which were not seized. Thus, the validity of the subpoenae under state law, and the consequences of respondents' failure to move to quash, become a significant question with respect to the damages alleged in the federal complaint. If the subpoenae were valid, then respondents' failure to move to quash may constitute either a waiver of their objection to the alleged illegal seizure or a limitation on their damages claim to the period between October 5, 1984, when the search warrant was executed, and the subsequent date when respondents formally complied with the subpoenae.

In addition, petitioners have alleged (JA 60), and respondents have apparently agreed (JA 75), that some of the "illegally seized" documents were contained in a file marked "Grand Jury," which petitioners sealed upon seizure at the time of the warrant's execution so that a judge

could later determine what, if anything, contained therein was privileged and what could be reviewed by the state's attorneys. The third circuit suggested this very procedure for questionable documents (questionable in the sense that they are apparently within the scope of the warrant, but may be protected by a privilege) in *Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955, 962 (3rd Cir. 1984). In some sense, this procedure was employed in this case with respect to all of those seized documents which were apparently within the scope of the warrant, but which were sealed pending subsequent judicial determination. With respect to such documents, petitioners submit that respondents are not entitled to damages. Rather they are entitled to a forum in which a judge can determine what should be retained by the state and what should be returned to respondents. See *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1984). Again, this should be done in a state forum because the criminal investigation was undertaken by state officials, and because a state judge, rather than a federal judge, should adjudicate respondents' claims to privileges arising under state law.

For these several reasons, the district court was afforded ample discretion to dismiss, rather than to stay respondents' complaint. The circuit court erred when it concluded otherwise.

### CONCLUSION

Consistent with the *Younger* doctrine, federal courts should abstain from intruding into a state grand jury investigation when they are requested to intrude by complainants in a 42 U.S.C. sec. 1983 action who seek the return of property seized pursuant to a warrant, but who may seek redress from the state court which supervises the grand jury and issued the warrant. Thus, the district court properly abstained in this case. Moreover, the district court had discretion to dismiss, rather than to stay, the



ancillary claim for damages when it properly chose to abstain from the equitable portion of the 42 U.S.C. sec. 1983 action.

Respectfully submitted,

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**RESPONDENT'S**

**BRIEF**

MAY 15 1987

IN THE  
**Supreme Court of the United States** F. SPANIOLO, JR.  
 CLERK

OCTOBER TERM, 1987

DEAN DEAKINS, New Jersey Division of Criminal Justice; IRVING DUBOW, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; RONALD LEHMAN, New Jersey State Police; ALBERT G. PALENTCHAR, New Jersey Division of Criminal Justice; DONALD A. PAN-FILE, New Jersey Department of Treasury; WALTER PRICE, New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundations & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice,

*Petitioners,*

vs.

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES, FOUNDATIONS & STRUCTURES, INC., WILLIAM E. MONAGHAN ASSOCIATES, AND MJD CONSTRUCTION COMPANY, INC.,

*Respondents.*

**On Writ of Certiorari to the United States Court of  
 Appeals for the Third Circuit**

**BRIEF FOR THE RESPONDENTS**

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### Questions Presented

1. Must federal courts, by virtue of a 42 U.S.C. sec. 1983 action for the return of property seized pursuant to a warrant, filed by the targets of an ongoing state grand jury investigation, intrude into that investigation despite the *Younger* abstention doctrine where the federal complainants may seek redress from the state court which supervised the grand jury and issued the warrant?

2. Are federal courts absolutely barred from exercising their discretion to dismiss an ancillary claim for damages when they properly abstain from the equitable portion of a 42 U.S.C. sec. 1983 action?



### Parties to the Proceedings

Petitioners were sued below as individuals acting under color of state law. At the time of the events complained of, petitioners Deakins, DuBow, Gray, Palentchar, Price, Southwick and Soat were employed by the State of New Jersey, Division of Criminal Justice. Petitioner Lehman was an employee or agent of the New Jersey State Police; petitioner Panfile was an employee or agent of the New Jersey Department of Treasury. The three John Doe petitioners were identified by the complaint below as, respectively, an individual coordinating a search of the premises of respondent Foundations & Structures, Inc., an individual supervising investigators in the New Jersey Division of Criminal Justice, and an individual training investigators on the New Jersey Division of Criminal Justice.

Respondents are William Monaghan, Theodore DeSantis, John James, Foundations & Structures, Inc., William E. Monaghan Associates and MJD Construction Company, Inc.<sup>1</sup>

<sup>1</sup> Pursuant to Rule 28.1 petitioners state that Foundations & Structures, Inc. and M.J.D. Construction Company, Inc. are affiliated companies. Neither has any subsidiaries or other affiliated companies.

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No. 86-890

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

DEAN DEAKINS, New Jersey Division of Criminal Justice; IRVING DUBOW, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; RONALD LEHMAN, New Jersey State Police; ALBERT G. PALENTCHAR, New Jersey Division of Criminal Justice; DONALD A. PAN-FILE, New Jersey Department of Treasury; WALTER PRICE, New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundations & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice,

*Petitioners,*

vs.

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES, FOUNDATIONS & STRUCTURES, INC., WILLIAM E. MONAGHAN ASSOCIATES, AND MJD CONSTRUCTION COMPANY, INC.,

*Respondents.*

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**On Writ of Certiorari to the United States Court of  
Appeals for the Third Circuit**

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**BRIEF FOR THE RESPONDENTS**

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### **Jurisdiction**

Respondents' complaint, filed in the United States District Court for the District of New Jersey, invoked federal jurisdiction under 28 U.S.C. sec. 1331, 28 U.S.C. sec. 1343 and principles of pendent jurisdiction. Respondents otherwise rely on the jurisdictional statement contained in the "Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit," hereinafter "Petition for Writ of Certiorari." Respondents otherwise rely on the jurisdictional statement contained in the "Brief Of Petitioners On The Merits", hereafter "Pet. Br."



### **New Jersey Statutes Involved**

**N.J.Stat.Ann. sec. 2A:73A-8 (West 1976). Return of indictment or presentment; designation of venue; consolidation of indictments**

Any indictment or presentment by a State grand jury shall be returned to the assignment judge without designation of venue. Thereupon, the judge shall, by order, designate the county of venue for the purpose of trial. The judge may, by order, direct the consolidation of an indictment returned by a county grand jury with an indictment returned by a State grand jury and fix venue for trial.

**N.J.Stat.Ann. sec. 2A:14-2 (West 1976). 2 years; actions for injuries to person by wrongful act**

Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

### **New Jersey Court Rules Involved**

**New Jersey Court Rule 1:20-3 (h),(i),(k),(l)(3),(m). District Ethics Committee.**

(h) Formal Complaint. Every formal complaint shall be in writing and brought only in the name of the Committee or the Office of Attorney Ethics; it shall be signed by the Chair, Secretary, a member of the Committee or the Director or ethics counsel, and shall be filed with the Secretary. It shall state the names and addresses of the original grievant, if any, and the respondent; the facts constituting the alleged improper conduct by the attorney; and the ethical rules asserted to have been violated.

(i) Service; Answer; Discovery. Immediately upon receipt of a formal complaint, the Secretary shall serve a

copy on the respondent by certified mail return receipt requested in accordance with guidelines promulgated by the Director and mail a copy (including consolidated complaints) to any original grievants, and the Director. Within 10 days after the service of the formal complaint upon him, the respondent shall file a written answer thereto in quadruplicate with the Secretary, who shall thereupon forward one copy to the original grievant, if any, and one copy to the Director. In the answer the respondent may set forth circumstances of a mitigating nature bearing on the charge and shall set forth all affirmative defenses, including all claims of mental and physical disability, if any, and whether they are alleged to be causally related to the offense charged. The respondent also shall set forth a demand for discovery, if any, absent which demand discovery shall be waived. Discovery automatically shall require the respondent to give reciprocal discovery. Discovery may be requested by the Committee within 10 days after the due date for filing the answer. Discovery shall be in accordance with guidelines promulgated by the Director. In the answer the respondent also shall set forth any constitutional challenges to the proceedings. All constitutional questions shall be withheld for consideration by the Supreme Court as part of its review of any final decision of the Board. Interlocutory relief may be sought only in accordance with R. 1:20-5(c)(1).

(k) Attorney for Respondent. If a respondent desires legal representation but claims to be unable to retain counsel by reason of indigency, the respondent may make application on a form and in accordance with guidelines promulgated by the Director to the Assignment Judge who, for good cause shown, shall assign an attorney to represent respondent in the matter, without compensation. (l)(3) when all evidence has been received the matter may be determined by the remaining two members of the

panel provided their decision is unanimous. In the event of disagreement the Chair shall designate a third panelist who upon review of the entire record including the transcript of the proceedings shall be eligible to vote thereon.

The initial hearing shall be conducted on at least 10 days written notice to all interested parties. No initial hearing shall occur unless a formal written complaint, or in lieu thereof a written stipulation setting forth the agreed facts and issues remaining including the ethical rules asserted to have been violated, shall have been filed with the Secretary at least 10 days before the date set for the hearing. The hearing shall be conducted formally and in private but the strict rules of evidence need not be observed. A complete stenographic record shall be made by an official court reporter assigned by a supervising court reporter in the district for that purpose. The Committee Chair may, if appropriate, arrange instead for the record of the hearing to be sound recorded with equipment previously approved for court proceedings. All witnesses shall be duly sworn. The original grievant, if any, and the respondent shall have the right to be present at all times during the hearing with their attorneys, if any.

(m) Findings and Report. The hearing panel shall prepare a written dated report containing its findings of fact and conclusions on each issue presented. Only the Chair of the panel need sign the report, which shall state clearly the vote of each panel member. Any member of the panel not concurring therein may prepare a separate report.

**New Jersey Court Rule 3:5-7(a). Motion To Suppress Evidence and for Return of Property**

(a) Notice; Time. On notice to the prosecutor of the county in which the matter is pending or threatened, to the

applicant for the warrant if the search was with a warrant, and to co-indictees, if any, and in accordance with the applicable provisions of R. 1:6-3 and R. 3:10, a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding, may apply to the Superior Court only and in the county in which the matter is pending or threatened to suppress the evidence and for the return of the property seized even though the offenses charged or to be charged may be within the jurisdiction of a municipal court. Such motion shall be made within 30 days after the initial plea to the charge unless the court, for good cause shown, enlarges the time. A motion made before the trial shall be determined before trial. The motion may be made after trial has commenced only if the trial court finds that defendant could not reasonably have made it prior thereto.

**N.J. Rules Governing Professional Conduct Rule 3.3(d)  
RPC 3.3. Candor Toward the Tribunal**

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

**Ohio Statutes Involved**

**Ohio Rev. Code Ann. §4112.05(C)(D)(E) (Supp. 1986).  
Proceedings on complaint; findings; transcript of record**

(C) Any such complaint may be amended by the commission, or a member thereof, or its hearing examiner conducting the hearing, at any time prior to or during the hearing based thereon. The respondent has the right to file

an answer or an amended answer to the original and amended complaint and to appear at such hearing in person, or by attorney, or otherwise to examine and cross-examine witnesses.

(D) The complainant shall be a party to the proceeding and any person who is an indispensable party to a complete determination or settlement of a question involved in a proceeding shall be joined. Any person who has or claims an interest in the subject of the hearing and in obtaining or preventing relief against the acts of practices complained of may be, in the discretion of the person or persons conducting the hearing, permitted to appear for the presentation of oral or written arguments.

(E) In any proceeding, the member, hearing examiner, or commission shall not be bound by the rules of evidence prevailing in the courts of law or equity, but shall, in ascertaining the practices followed by the respondent, take into account all reliable, probative, and substantial evidence, statistical or otherwise, produced at the hearing, which may tend to prove the existence of a predetermined pattern of employment or membership, provided that nothing contained in this section shall be construed to authorize or require any person to observe the proportion which persons of any race, color, religion, sex, national origin, handicap, age, or ancestry bear to the total population or in accordance with any criterion other than the individual qualifications of the applicant.

**Ohio Rev. Code Ann. §4112.06 (A) (Supp. 1986). Judicial review**

(A) Any complainant, or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue a complaint, may obtain judicial review

thereof, and the commission may obtain an order of court for the enforcement of its final orders, in a proceeding as provided in this section. Such proceeding shall be brought in the common pleas court of the state within any county wherein the unlawful discriminatory practice which is the subject of the commission's order was committed or wherein any respondent required in the order to cease and desist from an unlawful discriminatory practice or to take affirmative action resides or transacts business.

**Statement of the Case**

On October 5, 1984, the nine named petitioners, all investigators employed in various capacities by the State of New Jersey (hereinafter "investigators"), executed a search warrant on the premises of respondent Foundations & Structures, Inc. ("F & S"), a construction and engineering firm located in Tuckahoe, New Jersey. On December 26, 1984, respondents (hereinafter "plaintiffs") filed an action in the United States District Court for the District of New Jersey pursuant to 42 U.S.C. §1983, alleging that the circumstances and manner of the search violated rights guaranteed to the plaintiffs under the United States Constitution and under the common law of the State of New Jersey.

The individual federal court plaintiffs, William E. Monaghan, Theodore DeSantis and John James, are long-time business partners who jointly own F & S as well as MJD Construction Company, Inc. ("MJD") and William E. Monaghan Associates ("Monaghan Associates"). (Complaint, ¶¶5-7, JA 14-15). The three men have done business from the same location in Tuckahoe, New Jersey for over twenty years. (Complaint, Count I, ¶6, JA 18).



The warrant in question was issued on October 4, 1984 by the Honorable Samuel T. Lenox, Jr., Assignment Judge, Superior Court of New Jersey, Mercer County, New Jersey, upon the sworn affidavit of investigator Albert G. Palentchar that he had probable cause to believe that documents constituting evidence of or tending to show certain crimes, including bribery and falsifying records, were located on the premises of F & S. (JA 36-37).

Plaintiffs alleged in their complaint that on October 5, 1984, the morning after the warrant was obtained, Monaghan was awakened at his home at approximately 7:00 a.m. by investigators Deakins and Sost. Monaghan was not informed that the investigators had already obtained a search warrant for his place of business or informed that he was a target of any investigation. Instead, Deakins and Sost told Monaghan that they wanted his cooperation as a potential witness in an investigation of bribery and official misconduct involving others in Cape May County. (Complaint, Count I, ¶2, JA 15-17).

Monaghan did not refuse to cooperate but insisted on having his attorney present. After Monaghan reached his attorney by telephone and arranged for a meeting later that day, and after Deakins and Sost agreed with Monaghan's attorney not to interview Monaghan further at that time, Deakins and Sost nonetheless continued to try to elicit statements from Monaghan, threatening to make him and his construction companies the focus of a criminal investigation and possible prosecution unless he cooperated. (Complaint, Count I, ¶1 JA 16-17).

Plaintiffs allege that at approximately the same time, DeSantis was being subjected to a similar early morning roust by two other investigators. DeSantis was told that his cooperation was needed as a witness; he was not told

that a warrant had been obtained to search the offices of F & S or that he might be a target of an investigation. Despite DeSantis' insistence that he wanted his attorney present at any discussion, DeSantis was pressured to make an immediate choice between cooperation or becoming the focus of an investigation. (Complaint, Count I, ¶4, JA 17-18).

The warrant in question authorized the search and seizure of certain specific business records: (1) file material pertaining to a site preparation contract for the Ocean City Waste Water Treatment Plant; (2) file material pertaining to property owned by F & S and Monaghan Associates which had been designated as the planned site for the Cape May County Municipal Utilities Sanitary Landfill Site; (3) documents pertaining to work performed by F & S for the City of North Wildwood; (4) cancelled checks and bank statements for accounts maintained by F & S and Monaghan Associates; (5) accounting records such as cash disbursement journals and cash receipts journals of F & S and Monaghan Associates; and (6) telephone message logs and appointment books of F & S and Monaghan Associates. The time period covered by the warrant was September 7, 1978 to the date of the warrant. (Complaint, Exhibit A, JA 37-38).

Immediately following their early morning encounters with Monaghan and DeSantis, the state investigators proceeded to execute the warrant. As alleged by the complaint, the nine named investigators occupied the F & S premises for nearly eight hours, barricading the sole exit to the fenced-in multi-acre site, searching exiting vehicles, taking photographs and recording serial numbers. (Complaint, Count I, ¶7, JA 18-19). The investigators required everyone on the sprawling site, including non-employees of F & S, to assemble in the main office and to produce

identification, used the company telephone without authorization and denied such use to others. (Complaint, Count I, ¶¶ 7 & 10, JA 19-20). Plaintiffs further alleged that the investigators ignored a proffer of an index to the files and instead searched all files, boxes, desks, drawers, briefcases and receptacles within the office area. (Complaint, Count I, ¶7, JA 18). Threats were made to tear plaintiffs' houses apart if documents were not found. (Complaint, Count I, ¶10, JA 20). In the middle of the search, one or more of the investigators suggested to plaintiffs Monaghan and DeSantis that any information given at that time would be considered voluntary. (Complaint, Count II, ¶2, JA 22).

Plaintiffs alleged that the investigators ultimately seized and removed, not only documents within the warrant, but hundreds of documents that were facially outside the scope of the warrant or protected by attorney-client or work product privilege. (Complaint, Count I, ¶7, JA 19). Some of the privileged documents were contained in a folder plainly marked "Grand Jury". (App. D, Petition for Writ of Certiorari, p. 24a).

During the course of the search, plaintiff Monaghan was served with three state grand jury *subpoenae duces tecum* issued on October 4, 1984, the day before the search. (Complaint, Exhibits B, C and D, JA 39-41, JA 42-44 and JA 45-50, respectively). The first two subpoenas covered the same documents sought by the warrant except that F & S and Monaghan Associates each received its own subpoena addressed solely to that entity's documents. Unlike the warrant, these subpoenas contained no date restriction. Although F & S and Monaghan Associates later produced some documents in response to the first two subpoenas, they pointed out that most of the documents were already in the possession of the state as a

result of execution of the search warrant. (App. B, Petition for Writ of Certiorari, p. 8a).

The third *subpoena duces tecum*, plaintiffs alleged, was brought to the F & S premises improperly issued in blank by a deputy attorney general who was not present during the search. This subpoena was filled in after one of the investigators reviewed documents outside the scope of the warrant. (Complaint, Count I, ¶9, JA 20).

This subpoena, as well as a fourth which the state issued as a substitute, was later withdrawn by the state on November 15, 1984 in response to a motion to quash which Monaghan Associates and F & S filed before Judge Lenox. (JA 58; App. B, Petition for Writ of Certiorari, p. 8a).

Plaintiffs' counsel arrived at the scene of the search during the afternoon. (JA 56-57). When a dispute arose over whether the investigators were providing an adequate receipt for the documents which they were removing, counsel and one of the investigators telephoned Judge Lenox who suggested that all of the documents be sealed until the issue over the adequacy of the receipt was resolved. (JA 61). The receipt issue was resolved on October 23, 1984 when counsel and representatives of F & S, including Monaghan, traveled to Trenton, New Jersey and took a full inventory of the documents seized by the state. (JA 62). However, during that inventory, plaintiffs' counsel again raised the issue of the privileged nature of certain documents. Some of the documents which were allegedly privileged were resealed by consent of counsel and representatives of the state pending a judicial resolution of the claims of privilege. (JA 62).

In their complaint, filed pursuant to 42 U.S.C. §1983 and principles of pendent jurisdiction, plaintiffs alleged



violations of federal constitutional rights relating to search and seizure (Count I), due process (Count II), interference with rights of counsel and the protection against self-incrimination (Count III) and deprivation of liberty (Count VI). Plaintiffs also asserted causes of action arising under the common laws of the State of New Jersey including trespass (Count IV), conversion (Count V), unlawful confinement (Count VII) and intentional or reckless infliction of emotional distress (Count VIII). Plaintiffs joined as defendants three "John Does" responsible, respectively, for the training, supervision and coordination of the activities of the nine investigators who physically conducted the search. (JA 13-35).

Plaintiffs sought compensatory and punitive damages and costs and attorneys fees. Plaintiffs also sought preliminary and permanent injunctive relief directed toward the return of the documents seized pursuant to the warrant and toward prohibiting future unlawful conduct such as the seizure of privileged materials and the use of warrants for purposes of intimidation and coercion. (*E.g.*, JA 23-24). Plaintiffs did not seek to enjoin the issuance of further warrants or subpoenas or to enjoin any investigation or prosecution.

Petitioners moved to dismiss the complaint on or about January 28, 1985, contending, *inter alia*, that the district court should refrain from exercising jurisdiction under the principles of equitable abstention set forth in *Younger v. Harris*, 401 U.S. 37 (1971). On or about February 15, 1985, plaintiffs filed papers in opposition to the motion to dismiss and cross-moved for preliminary relief in the form of return of those documents seized on October 5, 1984 which were outside the scope of the warrant and/or privileged. Among the documents whose return plaintiffs sought were those sealed by consent during the inventory on October 23, 1984.

The Honorable Stanley S. Brotman, U.S.D.J., heard argument on these motions on March 8, 1985 and reserved on both motions. In order to maintain the status quo pending his decision, however, Judge Brotman issued a temporary restraining order prohibiting the state from unsealing the documents sealed by consent of counsel. (App. A, Petition for Writ of Certiorari, pp. 1a-2a).

On February 19, 1985, four days after plaintiffs filed their cross-motion in federal court for return of documents, the State of New Jersey obtained an order signed by Judge Lenox requiring some of the federal court plaintiffs to show cause why the documents sealed by consent of counsel during the inventory should not be unsealed. (JA 65). These documents constituted a subset of the documents which were the subject of plaintiffs' cross-motion in federal court.

The Order to Show Cause was obtained from the state court *ex parte*. It was supported by a verified petition submitted by Deputy Attorney General Julian W. Wilsey. The petition informed the state court that plaintiffs had filed an action in the federal district court alleging that their civil rights were violated as a result of the search on October 5, 1984. The petition did not advise the state court that the plaintiffs had filed a motion before the federal court which encompassed the documents which were the subject of the Order to Show Cause.

On March 11, 1985, three days after Judge Brotman entered his restraining order, plaintiffs appeared before Judge Lenox in response to the Order to Show Cause. Plaintiffs argued first that the Order should be vacated because the state had failed to comply with Rule 3.3(d) of the New Jersey Rules Governing Professional Conduct. Rule 3.3(d) requires that a lawyer in an *ex parte* pro-



ceeding "shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse." (JA 71-72). Plaintiffs also argued that the state court should defer to the federal court proceedings which were under way before Judge Brotman. (JA 72-75).

As to plaintiffs' first contention, Judge Lenox found that the omitted information would not have made a difference, (JA 83), since in his view the federal civil action was immaterial absent an injunctive order restraining the state court. (JA 86-87). For similar reasons, Judge Lenox rejected the request to defer to the federal action. Judge Lenox found that there was no conflict in having both cases proceeding simultaneously:

Consequently, I find the pendency of the Federal action to be immaterial to this Court and the issue before me. The New Jersey proceedings are criminal in nature. We have an ongoing criminal investigation involving violations of the criminal laws of this State. There is a grand jury in session. The Attorney [Tr. p. 39] General has represented that that grand jury is investigating these alleged criminal violations. The filing of the Federal suit does not in any way affect that ongoing criminal investigation. The Federal proceeding is civil in nature. It involves primarily federal law, not state law and to the extent that it involves state law to some extent it does not involve the same state law that we are talking about. There is no reason whatsoever why these two cases may not proceed simultaneously and there is no conflict in their doing so. (JA 86).

Judge Lenox allowed plaintiffs additional time to submit briefs going to the merits of the argument that the documents sealed by consent were privileged but specifically rejected plaintiffs' suggestion that they might want to

broaden the issues before him to cover issues other than privilege and to cover documents not sealed by consent of counsel. (JA 90-92). Judge Lenox pointed out that an application for return of documents was a "separate motion" which was "typically heard by a judge of the Criminal Division", (JA 91), and stated: "You are not going to broaden the issue on this Order to Show Cause because the Order to Show Cause frames the issue. If you intend to raise other issues, you will do so by your own motion." (JA 92).

On March 25, 1987, Judge Lenox heard further argument on the Order to Show Cause. At that time, Judge Lenox ordered that plaintiffs be allowed to make copies of the documents sealed by consent to facilitate the submission of more detailed affidavits, (App. B, Petition for Writ of Certiorari, p. 15a) and otherwise established procedures to be used in determining the applicability of the asserted privileges.

Having relied heavily on the Order to Show Cause in argument before Judge Brotman, the state subsequently allowed its application before Judge Lenox to languish. On or about June 28, 1985, Judge Lenox requested the state to comply with orders of the state court by specifying factual assertions in the submitted affidavits to be the subject of a hearing. (App. B, Respondents' Brief In Opposition to Writ of Certiorari, pp. 52a-53a). The State of New Jersey took no action in response to this letter for over 10 months. Finally, on or about May 12, 1986, Judge Lenox notified all parties that he considered the State's motion to unseal documents withdrawn. (App. C, Respondents' Brief In Opposition to Petition for Certiorari pp. 54a-55a).

On August 6, 1985, the federal district court dismissed plaintiffs' federal action on abstention grounds, holding

that "[a] grand jury investigation constitutes an ongoing state proceeding under New Jersey law and mandates the application of *Younger* principles here." (App. B, Petition for Writ of Certiorari, p. 12a). The district court found that plaintiffs had not shown sufficient evidence of irreparable injury to justify invocation of the court's equitable powers, (App. B, Petition for Writ of Certiorari, p. 15a), and further found that a damage action could not be maintained in federal court where it would have a disruptive effect upon state criminal proceedings. (*Id.*, p. 14a).

Respondents filed a timely Notice of Appeal on September 4, 1985. On December 30, 1985, over four months after dismissal of the federal complaint, and over fourteen months after execution of the warrant, two of the six plaintiffs, William E. Monaghan and Theodore DeSantis, were informed that they were targets of a state grand jury investigation.

On July 31, 1986, the United States Court of Appeals for the Third Circuit unanimously held that the complaint should not have been dismissed. A majority of the court held that abstention was improper because no state proceeding was ongoing which could adjudicate the merits of plaintiffs' federal claims and because no indictments had been returned against plaintiffs at the time that they filed their complaint in the federal court. (App. D, Petition for Writ of Certiorari, p. 29a-30a). The Honorable Arlin M. Adams, U.S.C.J., dissented from this part of the decision in a separate opinion. Judge Adams nonetheless agreed with the majority of the court that even if abstention were otherwise proper, under controlling Third Circuit precedents the district court erred in not entering a stay and retaining jurisdiction over plaintiffs' claims for money damages and attorneys' fees. (App. D., Petition for Writ of Certiorari, p. 25a). The unani-

mous court also affirmed denial of preliminary relief. (App. D., Petition for Writ of Certiorari, p. 32a-33a).

On August 14, 1986, petitioners sought *en banc* rehearing. A majority of the active judges of the Third Circuit denied the petition in an order filed August 29, 1986 and again in an amended substitute order filed September 4, 1986. (App. E & F respectively, Petition for Writ of Certiorari, pp. 45a-47a). Judge Adams again dissented from these orders in separate statements.

On September 10, 1986, over one year after the complaint had been dismissed, plaintiffs William E. Monaghan, Theodore DeSantis and F & S were included as three of eleven persons indicted by a state grand jury.<sup>2</sup> As of the date of this brief, three of the plaintiffs, John James, Monaghan Associates, and MJD have not been indicted or informed that they are targets of any continuing investigation.

Discovery materials produced by the State of New Jersey subsequent to the indictments show that at least six state grand juries other than the indicting grand jury between the years 1984 and 1986 considered materials relevant to the pending prosecutions. (Appendix A). None of the documents seized on October 5, 1984 were submitted to the indicting grand jury.

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<sup>2</sup> Motions to dismiss these indictments will be filed in the near future.



### Summary of Argument

1. After the Third Circuit's ruling, a New Jersey state grand jury indicted three of the plaintiffs herein. The return of this indictment has rendered moot the petitioners' claim that the Third Circuit ruling interferes with an ongoing state grand jury proceeding. The equitable relief which the plaintiffs had been seeking in federal court can now be obtained from the state court to which the indictment has been assigned or has otherwise been mooted by the termination of the investigative stage. Accordingly, plaintiffs no longer seek injunctive relief in the federal court.

Since the plaintiffs' claim for injunctive relief is moot, this case is no longer worthy of this Court's attention. The plaintiffs will agree to stay their claim for damages pending the outcome of proceedings before the state court judge. The mere pendency of a damages action under 42 U.S.C. §1983 which is stayed until the conclusion of related state court proceedings poses no threat of undue federal court interference with pending state proceedings. *Younger v. Harris* is therefore inapplicable.

2. Well-established precedents of this Court provide that threatened prosecution is not a basis for *Younger* abstention. A federal plaintiff who is the subject of an ongoing grand jury investigation is only subject to threatened prosecution and therefore *Younger* abstention cannot be used to bar access to the federal forum. The expansion of *Younger* into non-criminal areas has not changed this rule. Mere prosecutorial attention is not enough to outweigh plaintiffs' right to a federal forum; the state's interest must crystallize in the institution of a formal prosecution before the plaintiff will have an adequate

forum and before the possibility of friction caused by parallel judicial consideration arises. Federal courts should abstain only when an actual state criminal charge has been filed.

The existence of a state grand jury investigation, moreover, does not satisfy the requirement of the institution of a pending judicial proceeding for purposes of *Younger* abstention. The grand jury proceeding has none of the traditional indicia of the proceedings to which this Court has deferred in the past. It is not focused on a particular litigant, is not adjudicatory in nature and makes no fixed determination of law and fact. Moreover, under New Jersey law, the state grand jury functions essentially as an investigative and prosecutorial tool for the state attorney general's office. The Third Circuit's determination that there was no state judicial proceeding pending when plaintiffs filed their federal complaint is therefore correct.

Moreover, a state grand jury investigation does not provide plaintiffs with an adequate opportunity to raise federal constitutional claims. Pursuant to *Younger* and its progeny, these claims must be capable of being presented in the state proceedings to which the federal court defers. *Ohio Civil Rights Comm'n. v. Dayton Christian Schools, Inc.*, 477 U.S. —, 106 S. Ct. 2718, 91 L.Ed.2d 512 (1986) did not hold that the availability of judicial review was enough where the forum was otherwise inadequate and does not otherwise control this case. Judicial supervision of grand jury procedures is not an adequate substitution for a formal proceeding which can adjudicate plaintiffs' substantive constitutional claims and provide remedies, including damages. The authority of the supervising judge of the state grand jury is ministerial and procedural; plaintiffs' claims did not go to procedural irregularities in the operation of



the grand jury but to completed constitutional violations by agents of the state prosecutor's office. Moreover, relegating plaintiffs to remedies provided under state law runs afoul of the rule that exhaustion of state remedies is not required for a §1983 action.

Relying on the possibility that an indictment will issue ignores the well-established principle that a §1983 plaintiff is entitled to an immediate and certain forum for federal constitutional claims and unfairly results in possible prejudice arising from the running of the statute of limitations. This difficulty is exacerbated for the potential plaintiff where, as here, the defendants in the civil action (petitioners here) control the pace of the state investigation. The non-indicted plaintiffs, of course, have no state forum at all.

3. The Third Circuit correctly determined that plaintiffs' damages claims should not be dismissed under *Younger v. Harris* and that a stay would adequately further the interest of comity. Retaining jurisdiction of plaintiffs' claims will avoid any possible problems with the statute of limitations and will further the principle that federal courts must normally fulfill their duty to adjudicate federal claims properly brought before them. The damage claims will be stayed pending the outcome of the state criminal trial; thus, the pendency of the federal damage suit will not interfere with the state criminal case. Petitioners offer only speculation in support of their position that federalism considerations require the dismissal of plaintiffs' damage claims.

## LEGAL ARGUMENT

### I. The Return Of An Indictment By A State Grand Jury Has Rendered Moot Petitioners' First Question Presented For Review And Has Made Review Of The Remainder Of The Case Unnecessary.

On September 10, 1986, approximately twelve days after the Third Circuit first denied petitioners' application for rehearing *en banc*, plaintiffs Monaghan, DeSantis and F & S were included among those indicted by a state grand jury.<sup>3</sup> The return of this indictment, and subsequent proceedings in the trial court have combined to render moot petitioners' claim that the Third Circuit's ruling interferes with an ongoing state grand jury proceeding. Accordingly, plaintiffs no longer seek injunctive relief in the federal courts.

The criminal trial and all pre-trial proceedings are before the Honorable Isaac Serata of the Superior Court of New Jersey, Law Division, Cumberland County. Judge Serata has already entered an Order in that case requiring the return of certain documents seized during the search in violation of the attorney-client privilege. Further proceedings and motions directed at the return of other seized documents will be heard by the same court. Thus, a portion of the injunctive relief which plaintiffs had been seeking in federal court has been granted by the trial court and the plaintiffs' other injunctive-related claims which have not been mooted by the end of the period of investigation will soon be litigated there. Under these circumstances, plaintiffs have no further interest in pursuing their claim for injunctive relief in the federal courts. If this case is remanded to the district court, plaintiffs will

<sup>3</sup> The other plaintiffs were not indicted.

amend their complaint to eliminate any claim for injunctive relief and will further move to stay the damages portion of their §1983 action.

Federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). In federal cases, an actual controversy must be extant at all stages of appellate or certiorari review, and not simply at the date the action is filed. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Securities & Exchange Comm'n v. Medical Comm'n for Human Rights*, 404 U.S. 403 (1972). Where, as here, the party affected has disclaimed further interest in relief from this Court, that disclaimer is a sufficient reason to justify a refusal to volunteer aid not sought. *Trailmobile Co. v. Whirls*, 331 U.S. 40 (1947). In short, plaintiffs' claims for injunctive relief have been mooted by proceedings before Judge Serata.

Petitioners' second question asks this Court to determine whether federal courts discretion "to dismiss an ancillary claim for damages when they properly abstain from the equitable portion of a 42 U.S.C. §1983 action." This Court, of course, would only reach this question if it first determined that the "equitable portion" of plaintiffs' §1983 action mandated *Younger* abstention. However, the "equitable portion" of plaintiffs' action has been effectively removed from the case by subsequent events.

Since the first question presented for review is moot, the case in its present form is no longer worthy of this Court's attention. The plaintiffs intend to agree to a stay of the damages portion of their case pending the completion of the state criminal trial; petitioners' second question has accordingly been deprived of any real significance.

The *Younger* doctrine is designed to prevent undue federal court interference with pending state judicial proceedings. Obviously, the mere pendency of a §1983 damages action that is stayed will not cause any interference with anything pending at the state level. See Point III, *infra*. *Younger* thus has no application in this context.

Furthermore, stripped of any request for injunctive relief, the case presents the sole issue of whether a §1983 action which seeks only damages should be dismissed under an application of the *Younger* abstention doctrine. That issue, of course, was never presented to the courts below and thus is not appropriately before this Court. *Lockhart v. United States*, 460 U.S. 125, 133 (1983); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 (1970).

This case thus presents a classic example of a case where subsequent developments have removed from consideration the principal issue on which certiorari was granted. As a result, "there is no need for an opinion of this Court on the questions presented by the petition." *Burrell v. McCray*, 426 U.S. 471 (1976) (Stevens, J. concurring).

## II. The Third Circuit Was Correct In Concluding That *Younger* Abstention Does Not Apply.

At the time plaintiffs filed their action under 42 U.S.C. §1983, the warrant issued on October 4, 1984 had been fully executed.<sup>4</sup> No subpoenas were outstanding, no hearings

<sup>4</sup> The controlling facts in this case are those which existed on December 26, 1984, when plaintiffs filed their suit in the United States District Court for the District of New Jersey. See *Pennzoil Co. v. Texaco Inc.*, —U.S.—, 55 U.S.L.W. 4457, 5561 (April

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were pending and none of the plaintiffs had even been informed that they were targets of continuing state grand jury investigation. Moreover, plaintiffs did not seek to enjoin any prosecution or the issuance of any lawful grand jury process. Under these circumstances, the Third Circuit was clearly correct in reversing the district court's decision to abstain.

**A. Threatened prosecution is not a basis for abstention.**

From the inception of its consideration of abstention issues, this Court has clearly distinguished between actual prosecutions and those that were merely threatened. The main plaintiff in *Younger v. Harris* had been indicted in a California state court for violations of the California Criminal Syndicalism Act. Harris brought suit in federal court to have the prosecution enjoined. Three intervenors claimed that the prosecution of Harris would inhibit their various professional and political activities. *Id.* at 39-40.

This Court held that an injunction issued by the district court violated a "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 401 U.S. at 41. The Court based its holding on (1) "the basic doctrine of equity jurisprudence" which provides that a court of

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6, 1987). These were the facts considered by the Third Circuit in its reversal of the District Court. Although petitioners argue that under certain circumstances events occurring after the filing of the complaint can affect the abstention analysis, citing *Hicks v. Miranda*, 422 U.S. 332 (1975), petitioners suggest no significant events between the filing of the complaint and the dismissal of the complaint on August 6, 1985 which change the abstention analysis. The effect of the indictment which issued on September 10, 1986 is discussed in Point I, *supra*.

equity will not grant relief "when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.", *id.* at 44; and on (2) "Our Federalism", a concept which, according to the Court, involved sensitivity to the legitimate interests of both the state and federal governments and an avoidance of undue interference with the legitimate activities of the states. *Id.* The Court held, however, that the intervenors, none of whom had been "indicted, arrested, or even threatened by the prosecutor," *id.* at 41, had no standing even to bring suit. *Id.* at 41-42.

The Court directly addressed the rights of those who were threatened with prosecution but not yet actually subject to it in *Steffel v. Thompson*, 415 U.S. 452 (1974) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). The petitioner in *Steffel* had been threatened with arrest on three separate occasions for distributing political handbills on an exterior sidewalk of a shopping center. A companion had been arrested and arraigned on charges of trespass. 415 U.S. at 455-56. The petitioner filed suit in federal district court seeking injunctive and declaratory relief. The district court dismissed the complaint, relying on *Younger v. Harris* and its companion cases. Petitioner appealed only the denial of declaratory relief. 415 U.S. at 456 & n.6. This Court reversed.

Finding first that the plaintiff had presented an "actual controversy" because he had alleged facts showing that the threat of prosecution was not merely speculative, 415 U.S. at 459, the Court considered the abstention issue. The Court characterized *Younger* as holding that "federal courts should ordinarily refrain from enjoining on-going state criminal prosecutions." *Id.* at 460. The Court described the *Younger* holding as being premised on the belief that the pending state proceeding initiated by actual



prosecution "in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights. . ." *Id.* at 460. In that circumstance, the issuance of a federal injunction restraining the prosecution "would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts, 'to guard, enforce and protect every right granted or secured by the Constitution of the United States.'" *Id.* at 460-461, quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884).

In the absence of an actual prosecution, however, the Court went on to state, "relevant principles of equity, comity, and federalism 'have little force' . . .", *Id.* at 462, quoting *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 509 (1972). The Court pointed out:

When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding. (Citation omitted).

415 U.S. at 462.

In fact, the Court noted:

*Requiring the federal courts totally to step aside when no state criminal prosecution is pending*

*against the federal plaintiff would turn federalism on its head.*

*Id.* at 472. (Emphasis added.)

The Court therefore held that federal declaratory relief was not precluded when no state prosecution was pending and the potential federal plaintiff nonetheless demonstrated a genuine threat of enforcement of a disputed state statute. 415 U.S. at 475.

This holding was expressly extended to claims for injunctive relief in *Doran v. Salem Inn*, where again the Court carefully distinguished the two plaintiff corporations which had not been issued criminal summonses from the plaintiff corporation which had. 422 U.S. at 939-40.

In recent years, the principles of *Younger v. Harris* have been applied outside the criminal area. See, e.g., *Pennzoil Co. v. Texaco, Inc.*, — U.S. —, 55 U.S.L.W. 4457 (1987); *Ohio Civil Rights Comm'n v. Dayton Christian School Co., Inc.*, 477 U.S. —, 106 S. Ct. 2718, 91 L.Ed. 2d 512 (1986); *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Judice v. Vail*, 430 U.S. 327 (1977). The instant case, however, falls within the older line of cases beginning with *Younger*, *Steffel*, and *Doran v. Salem Inn* which deal with, *inter alia*, the distinction between the institution of formal criminal proceedings and threatened prosecution.

The fact that plaintiffs were the subjects of a search warrant and grand jury subpoenas gives them standing to sue; mere prosecutorial attention, however, is not enough to require abstention. See *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965). Plaintiffs concede that the state's interest in the enforcement of its criminal laws is impli-

cated in this case. However, as the *Younger-Steffel-Doran Inn* line of cases shows, that interest will not bar access to the federal court until it has crystallized in the institution of a formal criminal prosecution.<sup>5</sup> It is only at that point that the judicial institutions of the state become mobilized and provide the criminal defendant with a forum for his constitutional claims. See *Steffel v. Thompson*, 415 U.S. at 462. It is friction with the state's judicial institutions that *Younger* abstention seeks primarily to avoid. *Id.*; see also *Pennzoil Co. v. Texaco*, 55 U.S.L.W. at 4460 n.9 (Various types of abstention "reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes"), emphasis added.

None of the plaintiffs was even informed that they were targets until over four months after the complaint was dismissed. Three of the plaintiffs to this day have neither been indicted nor informed that they are targets of a continuing investigation. Under these circumstances, the Third Circuit correctly held that abstention was improper.

**B. A grand jury investigation is not an ongoing judicial proceeding.**

*Younger* abstention doctrine requires the existence of "ongoing state judicial proceedings that concern important state interests" in which federal claims have been or could be presented. *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 237-238, emphasis added. Accord, *Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. at 432.

<sup>5</sup> The state's interest in breaking up oligarchical patterns of land ownership was undisputed in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), but the district court's refusal to abstain was upheld by this Court because of the absence of a pending state judicial proceeding.

The petitioners contend that the pendency of a state grand jury investigation satisfies the requirement of a pending judicial proceeding for purposes of *Younger* abstention. However, the proceedings to which this Court has deferred in the past have been characterized by the traditional indicia of a fact-finding proceeding which has been formally mobilized against a particular litigant.<sup>6</sup> See, e.g., *Pennzoil Co. v. Texaco*, 55 U.S.L.W. at 4461 n.13 (Appeal of judgment giving rise to constitutional claims); *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 91 L.Ed.2d at 520 (Administrative hearing commenced by the filing of a complaint and answer); *Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. at 433 (Bar disciplinary proceeding initiated by the filing of a complaint); *Trainor v. Hernandez*, 431 U.S. at 446 n.9 (State proceeding pending because of writ of attachment carrying return date). No such indicia exist here. Moreover, fairly read, plaintiffs' complaint alleged that whatever grand jury investigation was pending was not focused on them (Count I, ¶¶2 & 3, JA 16-18) and, indeed, plaintiffs Deakins and Monaghan were not informed that they were targets until four months after the district court dismissed the complaint.<sup>7</sup>

This Court looks to whether the proceeding in question is considered adjudicatory in nature under state law.<sup>8</sup> *E.g.*,

<sup>6</sup> The search for formal indicia of an adjudicatory forum has obvious links to the requirement that the pending state proceeding provide an adequate forum for the plaintiff's federal constitutional claims. This requirement will be discussed more fully in Point II, C, *infra*.

<sup>7</sup> For present purposes, the allegations of the complaint must be accepted as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Because of the spectre of retaliatory indictment, this point is not weakened by the ultimate issuance of the indictment.

<sup>8</sup> For this reason, and because they are not abstention cases,

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*Middlesex County Ethics Committee*, 457 U.S. at 433. Where state law clearly provides that the proceeding in question is not part of, and is not itself, a judicial proceeding, abstention is not required. *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 239 (1984).

Under New Jersey law, a grand jury is an "inquisitorial, informing, and accusing body, but it is not generally regarded as a judicial body or tribunal; it always proceeds *ex parte*, and it is not a trial body or the ultimate fact finder." *Rosetty v. Hamilton Township Committee*, 82 N.J. Super. 340, 348 (Law Div. 1964), *affirmed per curiam*, 96 N.J. Super. 66 (App. Div. 1967), *quoting In re Neff*, 206 F.2d 149, 152 (3d Cir. 1953). New Jersey law clearly states that proceedings before the grand jury are not adversarial in nature. *State v. Hart*, 139 N.J. Super. 565, 567 (App. Div. 1976). The grand jury deliberates in secret, *State v. Hart*, 139 N.J. Super. at 567, and witnesses before it have "limited rights" in contrast with the "awesome power" of the prosecutor. *State v. Doliner*, 96 N.J. 236, 249-50 (1984). These limited rights contrast sharply with the rights of notice, cross-examination, counsel and presentation of evidence which were present even in the administrative proceedings considered by the Court in the *Ohio Civil Right Comm'n* and *Middlesex Ethics Committee* decisions. *See, e.g.*, Ohio Rev. Code Ann. §§4112.05, 4112.06 (Supp. 1986); N.J.Ct. R. 1:20-3. Although those pro-

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*Levine v. United States*, 362 U.S. 610 (1960), *Cobbledick v. United States*, 309 U.S. 323 (1940) and *Ex parte Young*, 209 U.S. 123 (1908), which are cited by petitioners for the proposition that grand jury proceedings are judicial proceedings under federal law, are inapposite. Moreover, this Court has elsewhere recognized the essentially non-adjudicatory nature of the grand jury function. *See, e.g.*, *United States v. Sells Engineering Inc.*, 463 U.S. 418, 424 (1983).

ceedings were administrative in form, they were clearly adjudicatory in nature, a fact that was crucial in each case to the Court's finding that abstention was applicable. *E.g.*, *Ohio Civil Rights Comm'n*, 91 L.Ed.2d at 522. Moreover, the findings of the grand jury are not judicial in character: a returned indictment "in no sense reflects an ultimate disposition . . ." *Rosetty v. Hamilton Township Committee*, 82 N.J. Super. at 348-349.

Petitioners' reliance on general references in New Jersey cases to the grand jury as an "arm of the court," *see, e.g.*, *In re Tusso*, 73 N.J. 575, 587, 376 A.2d 895, 900 (1977) (Pashman, J., dissenting); *State v. Smith*, 102 N.J. Super. 325, 336, 246 A.2d 35, 41 (Law Div. 1968), *aff'd*, 55 N.J. 476, 262 A.2d 868 (1970), *cert. denied*, 400 U.S. 949 (1970); *In re Jeck*, 26 N.J. Super. 514, 519, 98 A.2d 319, 321 (App. Div. 1953), *certif. denied*, 13 N.J. 429, 100 A.2d 215 (1953), cannot disguise that the New Jersey state grand jury functions primarily as an investigative and prosecutorial tool of the state prosecutor's office.<sup>9</sup> *See State v. Doliner*, 96 N.J. at 244 (New state grand jury actually functions "as a criminal investigative agency"); *State v. Zicarelli*, 122 N.J. Super. 225, 235, 300 A.2d 154 (App. Div.), *certif. denied*, 63 N.J. 252, *cert. denied*, 414 U.S. 875 (1973) (State grand jury is "... a new weapon, or agency, created by the legislature to enforce the criminal law."). Thus, the prosecutor's office decides whether to request the impaneling of a particular state grand jury and on what subjects. *See, e.g.*, N.J.S.A. 2A:73A-2. The prose-

<sup>9</sup> The fact that administration of the state grand jury system is entrusted to the supervision of an assignment judge designated by the New Jersey Supreme Court, *see* N.J.S.A. 2A:73A-6; N.J. Ct. R. 3:6-11(b), does not, as is discussed more fully in Point II (C), make the state grand jury a judicial proceeding for abstention purposes.



ector can conduct investigations without first establishing the likelihood that any offense has been committed. *State v. Doliner*, 96 N.J. at 249, citing *In re Addonizio*, 53 N.J. 107 (1968). He can issue subpoenas in the name of the grand jury at his discretion and while no grand jury is actually sitting. See *State v. Hilltop Nursing Home*, 177 N.J. Super. 377, 389 (App. Div. 1981). The functional uninvolvedness of the state grand jury in the conduct of investigations is emphasized by the fact that the documents obtained by warrant in this case were placed in the custody of the prosecutor, not the grand jury, and were not even presented to the indicting grand jury.

The basis for plaintiffs' federal complaint lies primarily in the violations of rights by state investigative officials in connection with the execution of a search warrant rather than in the operation of the grand jury. It was for this reason that Judge Lenox clearly found that the pendency of the civil action did not interfere in any way with the grand jury investigation. (JA 86).

A state grand jury investigation further differs from the proceedings previously viewed by this Court as judicial in nature because a state grand jury investigation has no fixed duration. Although a specific state grand jury sits for a specific term and is then discharged, a grand jury investigation can span several grand jury terms. Discovery produced in connection with the pending criminal indictment shows in fact that *six* different grand juries, besides the indicting grand jury, considered materials relevant to the subject of the indictment. (Appendix A). Characterizing a state grand jury investigation as a pending judicial state proceeding would cause a plaintiff's rights to a federal forum to ebb and flow with the beginnings and endings of the various grand jury terms.

Moreover, such a characterization would bar from the federal forum *all* those caught up in the characteristically broad sweep of the investigation. See, e.g., *State v. Doliner*, 96 N.J. at 249. This result runs directly counter to the threatened prosecution decisions of this Court.

The few decisions cited by petitioners in which *Younger* abstention was applied to a grand jury proceeding are clearly distinguishable and in any event offer little guidance to an analysis which depends upon the nature of specific claims and state procedures. In both *Notey v. Hynes*, 418 F.Supp. 1320 (E.D. N.Y. 1976) and *Law Firm of Daniel P. Foster v. Dearie*, 613 F.Supp. 278, 280 (E.D. N.Y. 1985), for example, the federal court plaintiffs were essentially using the federal court to collaterally attack state court rulings on the validity of grand jury subpoenas. See, *Notey*, 418 F.Supp. at 1325; *Law Firm of Daniel P. Foster*, 613 F.Supp. at 282. See also *Judice v. Vail*, 430 U.S. 327 (1977). That is not the case here. In *Kaylor v. Fields*, 661 F.2d 1177 (8th Cir. 1981), at least one of the plaintiffs had been arrested and charged at the time of the district court decision. Even that was not sufficient to determine whether abstention was appropriate, however, and the court carefully considered the nature of specific claims in determining whether abstention should apply. See 661 F.2d at 1181 & 1182.

**C. The state grand jury investigation does not provide plaintiffs with an adequate opportunity to raise their constitutional claims.**

The Third Circuit determined that there was no state judicial proceeding pending at the time plaintiffs filed their federal complaint that provided plaintiffs with an adequate opportunity to obtain an adjudication of their federal constitutional claims. (App. D, Petition for Writ of Certiorari 32a). This holding was unquestionably correct.

The opportunity to raise the federal constitutional claims must be presented *in the state proceedings* to which the federal court is asked to defer. See *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 91 L.Ed.2d at 522; *Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. at 432. Where claims cannot be raised in the pending proceeding, or where the state proceeding which is pending is separate and distinct from a proceeding which can consider constitutional claims, abstention is inappropriate. See, respectively, *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 238-239.

As petitioners concede, none of plaintiffs' claims could have been raised in the grand jury proceeding itself. Br. Pet. p. 25. It is also apparent that the grand jury can offer no affirmative relief, injunctive or monetary. Plaintiffs sought both in this suit. Finally, the grand jury does not provide an adequate forum because of the secret, uncertain and intermittent nature of its activities.

Petitioners rely, however, on the availability of what they vaguely refer to as "state judicial review," citing *Ohio Civil Rights Comm'n v. Dayton Christian Schools*. See Br. Pet. at p. 25. By "state judicial review," petitioners apparently refer to Judge Lenox' supervisory position vis-a-vis the state grand jury.

*Ohio Civil Rights Comm'n v. Dayton Christian Schools* does not apply to the facts of this case. By the time the religiously affiliated plaintiff in that case instituted its federal action, the Commission had commenced a formal administrative hearing by filing a complaint which the corporation had answered. *Id.* at 519-520. As this Court implicitly found, *id.* at 522 & n.2, the ongoing Ohio administrative hearing, unlike the grand jury investiga-

tion at issue here, had the full indicia of an adjudicatory forum. See Ohio Rev. Stat. Ann. §4112.05.

Against that background, the respondent corporation argued that the administrative hearings did not offer an opportunity to challenge sanctions for sex discrimination on constitutional grounds. 91 L.Ed.2d at 523. This Court rejected the argument, relying on, *inter alia*, decisions which demonstrated that the Ohio Civil Rights Commission considered religious justifications for otherwise illegal conduct. *Id.* The Court's concluding reference to the availability of judicial review is clearly *obiter dictum*.<sup>10</sup>

Moreover, petitioners confuse the availability of a possible forum (Judge Lenox) with the pendency of a proceeding to which the putative federal court plaintiff is already subject. The Court itself distinguished the two situations in the *Ohio Civil Rights Comm'n* decision. 91 L.Ed.2d at 522 n.2.

This Court has *never* required abstention in the absence of an actual proceeding. By seeking to require plaintiffs to *institute* proceedings before Judge Lenox—or any other state forum—petitioners run afoul of the long-standing principle, reaffirmed by this Court in the *Ohio Civil Rights Comm'n* decision, that exhaustion of state remedies is not required before a §1983 plaintiff may have access to the federal courts. *Ohio Civil Rights Comm'n*, 91 L.Ed.2d at 522 n.2; *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

Petitioner's reliance on Judge Lenox's supervisory role is misplaced for other fundamental reasons directly related

<sup>10</sup> Nor can petitioners rely on the Court's citation of the *Middlesex Ethics Committee* decision at this point. The Court had specifically pointed out earlier in the opinion that references to the availability of judicial review in *Middlesex* were also dictum. 91 L. Ed. 2d at 522.



to the adequate forum requirement. Perhaps most obviously, plaintiffs could not have obtained damages, attorneys fees or full injunctive relief in any proceeding which was or could have been initiated before Judge Lenox.<sup>11</sup> Petitioners have labeled plaintiffs' damages claims in this case as "ancillary" (see, for example, Question No. 2 Presented for Review). But petitioners are wrong. Plaintiffs' claim for damages resulting from the violation of their constitutional rights lies at the heart of this case.<sup>12</sup>

Even beyond that, however, the State Grand Jury Act gives the New Jersey Supreme Court the authority to promulgate rules and regulations governing *procedural* matters relating to the state grand jury. N.J.S.A. 2A:73A-3; *State v. Haines*, 18 N.J. 550, 556, 115 A.2d 24 (1955). The authority given to the judge supervising the grand jury is corresponding ministerial in nature. N.J.S.A. 2A:73A-6. The supervising judge also has express authority to designate the county of venue and to consolidate indictments brought by a county and a state grand jury. N.J.S.A. 2A:73A-8.

Plaintiffs' claims did not go to procedural irregularities in the operation of the grand jury but to completed violations of substantive constitutional rights by agents of the state prosecutor's office. As this Court has observed,

<sup>11</sup> The actual applications to Judge Lenox which were initiated by plaintiffs, including counsels' informal telephone call to him on the day of the search and the subsequent motion to quash the improperly issued blank grand jury subpoena, all dealt with issues of state procedure, not with plaintiffs' claim for damages for violation of their substantive federal constitutional rights. In any event, those proceedings were not pending at the time of the filing of the federal complaint.

<sup>12</sup> Indeed, respondents have argued that their equitable claims have been mooted by the indictment. See Point I, *supra*.

claims such as these, brought under 42 U.S.C. §1983, are essentially tortious in nature. *Wilson v. Garcia*, 471 U.S. 261 (1985). No provision of New Jersey law gives the supervising judge of the state grand jury authority to adjudicate constitutional tort unrelated to procedural regulation of the grand jury.

Indeed, although the New Jersey Rules of Court do provide a procedure pursuant to which a person aggrieved by an unlawful search and seizure and having reasonable grounds to believe that documents will be used against him in a criminal proceeding may move for return of documents, that procedure is made available under the general rules of criminal procedure. See N.J.Ct. R. 3:5-7. The Rule 3:5-7 procedure exists separate and apart from the rules which govern the state grand jury. Reliance on Rule 3:5-7 is another effort to require exhaustion.

Judge Lenox himself, acknowledging his limited role when faced with the state's application for an Order to Show Cause, stated with respect to a possible general motion for return of documents:

THE COURT. That is a separate motion. . . . That's really not what I have before me. I have an Order to Show Cause in connection with sealed documents. If you file another motion, it may not come to me because that motion is typically heard by a judge of the Criminal Division. Right now, my only question involves the documents under seal.

(JA 91). With respect to plaintiffs' other claims, Judge Lenox was equally reluctant to provide a forum. (JA 91-92).

Nor can the mere possibility of a future indictment turn the state grand jury proceeding into an adequate forum. Plaintiffs are entitled to a forum which is timely and certain. See, e.g., *Patsy v. Florida Board of Regents*, 457 U.S. at 504; *Dombrowski v. Pfister*, 380 U.S. at 489; *Gibson*



v. *Berryville*, 411 U.S. at 577; *Brennick v. Hynes*, 471 F. Supp. 863, 867 (D.N.Y. 1979). Moreover, a criminal trial does not "review" a grand jury investigation in the normal sense; it adjudicates the underlying facts of guilt or innocence.

The facts of this case vividly illustrate the unfairness of requiring a potential plaintiff to forego his statutory right of access to the federal court on the ground that his federal constitutional claims can be presented as a defense if he is indicted as a result of the state investigation. See *Potomac Electric Power Company v. Sachs*, 802 F.2d 1527, 1532 (4th Cir. 1986), relied upon by petitioners. The relevant period of limitations for plaintiffs' §1983 claim is two years. See N.J.S.A. 2A:14-2. *Wilson v. Garcia*, 471 U.S. 261 (1985). By the time the status of the six plaintiffs was clarified by the issuance of an indictment on September 10, 1986, the limitations period had almost run. If plaintiffs had not filed their suit when they did, the unindicted plaintiffs might have lost the right of access to which, in retrospect, they at least were undisputedly entitled. The *Potomac Electric* decision does not address the issue posed by the possibility that an indictment may never issue.

The unfairness resulting from the uncertainty and delay of a grand jury investigation is exacerbated when, as in this case, there is an allegation of misuse of prosecutorial power and the defendants in the damages action control the length of time that the investigation will take. Consider, for example, how the State of New Jersey allowed the Order to Show Cause before Judge Lenox to lapse once the abstention argument had been made before the federal district court.

Finally, in this case, unlike the *Potomac Electric* case, the current prosecution does not provide an adequate oppor-

tunity for even the indicted plaintiffs to obtain an adjudication of all of their claims. The plaintiff in *Potomac Electric* sought only a declaratory judgment that the federal Toxic Substances Control Act preempted Maryland's laws and regulations concerning the disposal of hazardous wastes. That claim could have been raised as a defense in a criminal prosecution and therefore such a proceeding could have provided a full adjudication of the plaintiff's claim and the full relief sought. By contrast, plaintiffs Monaghan and DeSantis's federal constitutional claims of deprivation of liberty, violations of due process and interference with rights to counsel may not be raised as defenses in the criminal prosecution if the alleged violations, although providing a basis for damages, do not result in the state's obtaining any trial-related advantage. Nor is there an opportunity for these plaintiffs to obtain the damages and attorneys fees which they have a statutory right to seek. The state judicial proceeding to which the federal court defers must provide a forum for "all relevant issues." *Middlesex Ethics Committee*, 457 U.S. at 437; *Gerstein v. Pugh*, 420 U.S. at 108 n.9.

The instant suit arises under 42 U.S. §1983 and seeks essentially to vindicate the principle that "those who enforce the law must themselves obey it." *Baskin v. Parker*, 602 F.2d 1205, 1206 (5th Cir. 1979). This Court has always recognized the "paramount role" played by the federal courts in protecting federal constitutional rights. *Patsy v. Florida Board of Regents*, 457 U.S. at 503. In passing the precursor statutes to 1983, "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."

*Zwickler v. Koota*, 389 U.S. 241, 248 (1967), quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884). Abstention from the exercise of federal jurisdiction remains "the exception, not the rule." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976), quoted in *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 236.

*Younger* abstention applies only where state court proceedings are initiated before substantial proceedings on the merits have taken place in the federal courts.<sup>13</sup> *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 238. Petitioners in this case argue for an expansive view of abstention which would make the choice of a federal forum impossible for anyone touched, however peripherally, by the sweep of a state grand jury investigation, no matter how long that investigation took. In order to reach the conclusion that a state proceeding such as petitioners rely on here requires abstention, this Court will have to eliminate the requirement of a previously instituted state adjudicatory proceeding and the requirement that that proceeding provide an adequate forum for all relevant constitutional claims. In the process, the Court will also have repudiated the long held principles that threatened prosecution will not support abstention and that a §1983 plaintiff need not first exhaust the remedies provided by the state courts before availing himself of the federal forum provided to him by Congress.

Such a result cannot be justified by unspecific and unsupported claims that the plaintiffs' suit, which did not seek to enjoin any pending proceeding or the issuance of

<sup>13</sup> Plaintiffs note in this regard that Judge Brotman imposed temporary restraints on March 8, 1985. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 238-39.

any lawful process, will interfere with general state law enforcement activities. The concept of "Our Federalism", "... does not mean blind deference to 'States' Rights' ...". *Younger v. Harris*, 401 U.S. at 45. Judge Lenox himself found that the pendency of the civil action did not interfere in any way with the grand jury investigation. (JA 86). To require the federal court to abstain under *Younger v. Harris* under the facts of this case "... would turn federalism on its head." *Steffel v. Thompson*, 415 U.S. at 472.

### III. The Third Circuit Properly Required The Federal District Court To Follow Controlling Third Circuit Precedents And To Retain Jurisdiction Over Claims For Damages And Attorneys Fees.

The Third Circuit unanimously held that the district court "plainly erred" in dismissing plaintiffs' claim for money damages and attorneys fees rather than staying the federal case pending the outcome of proceedings at the state level, even if abstention were otherwise appropriate. (App. D, Petition for Writ of Certiorari, p. 25a, 33a Adams, U.S.C.J., concurring in this part of the decision). Relying on clear Third Circuit precedents, e.g., *Williams v. Red Bank Board of Education*, 662 F.2d 1008 (3rd Cir. 1981); *Crane v. Fauver*, 762 F.2d 325 (3rd Cir. 1985), the circuit court held that the district court erred in dismissing plaintiffs' claims for damages and attorneys fees because those claims could not have been considered in the pending state proceedings.

Although petitioners argue that the district court had discretion to dismiss the claim for damages, the district court had no discretion to ignore controlling precedents of the Third Circuit. In effect therefore, petitioners are



challenging on this appeal the *Crane v. Fauver* and *Williams v. Red Bank Board of Education* line of cases. However, these decisions appropriately balance the concerns of federalism and should be expressly approved by this Court.<sup>14</sup>

As petitioners concede, this Court has left open the question of whether *Younger v. Harris* requires the federal court to abstain from adjudicating an action brought under 42 U.S.C. §1983 where only money damages are sought. See *Judice v. Vale*, 430 U.S. at 339 n.16; see also, *Tower v. Glover*, 467 U.S. 914, 923 (1984). The plaintiff in *Younger* sought only equitable relief. The equitable underpinnings of *Younger* abstention have been reiterated by this Court in recent abstention decisions. See *Pennzoil v. Texaco*, 55 U.S.L.W. at 4460 n.9; *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 91 L.Ed.2d at 521. The gravamen of the *Crane* and *Williams* decisions, however, is not the inapplicability of *Younger's* equitable rationale to claims for damages but rather the need to balance the dual concerns of federalism where monetary relief is not available in the state proceeding.<sup>15</sup>

<sup>14</sup> This Court has recently cited the *Williams v. Red Bank Board of Education* decision with general approval. See *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 91 L.Ed.2d at 522 n.2.

<sup>15</sup> For this reason, petitioner's contention that the link between *Younger* abstention and principles of equitable jurisprudence has become increasingly tenuous is unpersuasive. Moreover, the argument is supported solely by reference to cases arising under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), e.g., *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970); *United Gas Pipeline Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962); *Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Alabama Public Service Comm'n v. Southern Railway*, 341 U.S. 341 (1951). Neither *Pullman* nor *Burford* is applicable here.

In *Williams v. Red Bank Board of Education*, the Third Circuit affirmed the dismissal of the plaintiff's claims for injunctive relief on the ground that a pending administrative hearing provided an adequate forum for those claims. The court held, however, that the district court had erred in dismissing plaintiff's claim for damages. 662 F.2d at 1024. The court first reasoned that "as a matter of the proper exercise of the federal courts' jurisdiction", it could not "justify dismissing a claim for constitutional damages and consequent attorney's fees when the state forum is unable, as it is here, to grant that relief." 662 F.2d at 1023. The court found that such a course of action would be inconsistent with the duty of the federal courts "to assume jurisdiction where jurisdiction properly exists." *Id.* at 1024. The circuit court further noted that simply dismissing without prejudice so that the plaintiff could return to the federal court after completion of the state court proceedings was impractical due to possible problems with the statute of limitations. *Id.* at 1024 & n.16. At the same time, a stay of the federal action served the interests of the state because such an order "would allow the State proceeding to proceed unimpeded, . . .", *id.* at 1024.

This flexible approach to §1983 actions which include hybrid claims for relief is entirely consistent with the general principles of abstention jurisprudence articulated by this Court. See, e.g., *Pennzoil v. Texaco*, 55 U.S.L.W. at 4460 n.9. *Williams* and its progeny extend the adequate forum requirement to preserve federal claims for damages and attorneys fees which are unable to be adjudicated in the state proceeding which requires abstention. This approach also furthers the general principle that "federal courts must normally fulfill their duty to



adjudicate federal questions properly brought before them." *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 238. Moreover, the *Williams* court's sensitivity to possible statute of limitations problems is well borne out here where the limitations period could have barred plaintiffs' suit as a result of the slow progress of the state's investigations. At the same time, the mechanism of a stay allows the state proceedings to go forward without hinderance, thereby furthering the interests of comity. *Younger v. Harris*, 401 U.S. at 44.

Petitioners do not quarrel with the careful analysis of the Third Circuit in the *Williams* decision. Rather, they argue first that the state courts of New Jersey can award damages and attorneys fees in suits brought under 42 U.S.C. §1983. It has long been settled, however, with respect to §1983 actions that: "exhaustion is not a prerequisite to an action under §1983 . . .". *Patsy v. Florida Board of Regents*, 457 U.S. at 501. *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981), relied upon by petitioners, did not change this rule. See, e.g., *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 91 L.Ed. 2d at 512. *Fair Assessment* was expressly limited to the unique area of challenges to the administration of state tax laws. *Id.* at 105.

Petitioners also cite several lower court federal cases which are either factually distinguishable or cannot be fairly read to disapprove of the stay mechanism. *Sartin v. Commissioner of Public Safety of the State of Minnesota*, 535 F.2d 430, 433-34 (8th Cir. 1976), in fact reinstated the federal plaintiff's claim for damages for false arrest although it upheld dismissal of claims for deprivation of due process and malicious prosecution on nonabstention

grounds. *Carras v. Williams*, 807 F.2d 1286 (6th Cir. 1986) held that abstention by the district court from adjudication of a claim for damages was error where the pending state civil action was between private litigants. *Id.* at 1291-92. In that decision, the Sixth Circuit specifically observed that "[s]uits which seek only monetary relief are much less intrusive into legitimate state functions than actions for injunctive or declaratory relief." *Id.* at 1291.

In another of the cited decisions, *McCurry v. Allen*, 606 F.2d 795 (8th Cir. 1979), *rev'd on other grounds sub nom. Allen v. McCurry*, 449 U.S. 90 (1980), the Eighth Circuit ordered "temporary abstention" and imposed a stay in order to prevent tolling of the statute of limitations. 606 F.2d at 799. The Second Circuit demonstrated a similar sensitivity to statute of limitations concerns in *Martin v. Merola*, 532 F.2d 191 (2d Cir. 1976). The *Merola* court upheld dismissal of the federal action on the grounds that it was premature but ordered that the period of limitations would be tolled until completion of the pending state court trial. 532 F.2d at 195 n.7.

Only two of the cases cited by petitioners, fairly read, expressly extended *Younger v. Harris* to damage claims under the facts before them, e.g., *Mann v. Jett*, 781 F.2d 1448 (9th Cir. 1986); *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974). *Guerro* focused on the need to avoid circumvention of the limits placed on the issuance of a writ of *habeas corpus* by state prisoners who used §1983 to attack the validity of their convictions. 498 F.2d at 1253. *Mann v. Jett* reasoned that entertaining the action for damages would have a "substantially disruptive effect upon

ongoing state criminal proceedings." 781 F.2d at 1449.<sup>16</sup> Neither case discusses whether the same result could be achieved through the less drastic mechanism of a stay.<sup>17</sup>

Consideration of normal abstention factors, which control here, compels the conclusion that the circuit court's stay appropriately balanced the concerns of comity and the federal interest in preserving the federal forum and avoiding prejudice to the plaintiff. By contrast, petitioners' focus is one-sided and speculative in the extreme. For example, petitioners argue that "the pendency of the damages claim, even if it had been stayed, would have hovered over and disrupted the state's investigation of plaintiffs' criminal conduct." Pet. Br. at p. 35. Petitioners offer no support for this statement except a series of hypotheses concerning what *might* happen if plaintiffs returned to the district court seeking a lifting of the stay, and if the district court determined at that point to let the federal case proceed.

<sup>16</sup> All of the above cases are distinguishable from the instant cases in that, in each, a formal state judicial proceeding was unquestionably in progress. However, the discussion throughout this Point assumes that the court has found abstention otherwise appropriate because of the pendency of an adequate state adjudicatory proceeding.

<sup>17</sup> Likewise, petitioners' reliance on *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) to support its contention that the District Court had discretion to dismiss plaintiffs' claim for damages is totally misplaced. At issue in that case was not abstention but the "wise judicial administration" exception to federal jurisdiction articulated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The *Colorado River/Moses H. Cone* analysis applies only if abstention is not otherwise applicable and in very limited circumstances. *Colorado River*, 424 U.S. at 813. This principle was reaffirmed by the *Moses H. Cone* decision, which held that the district court had erred in refusing to exercise the jurisdiction that it had. 460 U.S. at 19.

Petitioners also argue that a dismissal of plaintiffs' damage claims would further the policy against piecemeal litigation because plaintiffs' state law claims may not be adjudicated in the federal courts, citing *Pennhurst State School Hospital v. Hilderman*, 465 U.S. 89 (1984). This argument fails for at least two reasons. First, the cases relied upon by the petitioners for this proposition, including *Pennhurst, Society for Good Will to Retarded Children v. Como*, 737 F.2d 1239 (2d Cir. 1984); and *Rogers v. Oken*, 738 F.2d 1 (1st Cir. 1984), are cases in which the state was clearly the real party in interest. In the *Pennhurst* case, for example, the Court stressed that "all the relief ordered by the courts below was institutional and official in character. To the extent there was a violation of state law in this case, it is a case of the state itself not fulfilling its legislative promise". 465 U.S. at 108-109. It was in this context that the Court held that the plaintiffs' pendent state law claims were barred by the Eleventh Amendment. *Id.* & n.17.

By contrast, plaintiffs complain of specific personal conduct on the part of the named investigators which transgressed plaintiffs' rights under state law. Claims for relief were directed against petitioners personally.

Second, the effects of a dismissal rather than a stay are highly speculative with respect to the goal of avoiding piecemeal litigation. Plaintiffs might decide not to pursue their state law claims if those claims were dismissed. Moreover, plaintiffs John James, MJD and Monaghan Associates are not a part of the pending criminal prosecution and not all of the claims of the other plaintiffs can be adjudicated in that prosecution. Therefore, at least two proceedings may be necessary in order to adjudicate all

of the claims of all of the plaintiffs in any event. Even if plaintiffs' state law claims should be dismissed under *Pennhurst*, this is not a sufficient reason for the federal court to refuse to adjudicate plaintiffs' statutorily granted federal damage claims.

Petitioners have also argued that the presence of state law issues supports the district court's decision to dismiss the complaint. But this argument stands the case on its head. At the heart of this case lies the contention that the petitioners engaged in a systematic and egregious violation of plaintiffs' rights under the Fourth, Fifth, Sixth and Fourteenth Amendments in connection with a general search of plaintiffs' business premises. The minor state law issues which have arisen from the alleged illegal search may be relevant to plaintiffs' claims of constitutional violation, but do not subsume those claims. Petitioners' attempt to distort this §1983 into just another state court case should be firmly rejected by this Court.

## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that the issues in this case are moot or that, alternatively, the decision of the Third Circuit in this matter should be affirmed in all respects.**

Respectfully Submitted,

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**APPENDIX A**

State of New Jersey  
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W. CARY EDWARDS  
ATTORNEY GENERAL

DONALD R. BELSOLE  
FIRST ASSISTANT ATTORNEY GENERAL  
DIRECTOR

MARCH 9, 1987

John F. Trainor, Inc.  
Certified Shorthand Reporter  
17 Peace Street

Re: Supplemental Letter  
Release of G.J. Testimony  
SGJ168-86-9

Dear Sir:

This letter will act as a follow-up to mine of December 10, 1986 and serves to authorize release of additional G.J. testimony including all colloquy [sic] under State Grand Jury Numbers SGJ161-85-1; SGJ162-86-4; SGJ142-85-6; SGJ135-85-5; SGJ132-84-10; and SGJ119-84-10.

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*Appendix A*

The following are additional witnesses whose testimony is now authorized to be released:

Before SGJ162-86-4

Ronald Sost	1/14/86
Robert Hand	1/21/86
William Lundsford, Jr.	1/21/86
David Hand	2/ 4/86
John Altoonian	2/ 4/86
Ronald Sost	2/18/86
Carl Botzenhardt	2/18/86
Albert Palentchar	2/25/86
Anthony Vinci	3/ 4/86
John Boylan	3/ 4/86
Carl Botzenhardt	3/ 4/86
Keith Ingling	3/ 4/86
Lawrence Brownsey	3/11/86
John Boylan	3/18/86
John Boylan	3/25/86
Albert Palentchar	4/22/86
Herman Tolz	4/29/86
Peter Failla	4/29/86

Very truly yours,

/s/ LARRY G. WELLE  
Lawrence G. Welle D.A.G.

cc: All counsel  
Judge Serata

# MEMORANDUM



MAY 18 1987

JOSEPH F. SPANOL, JR.  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

DEAN DEAKINS, New Jersey Division of Criminal Justice; IRVING DUBOW, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; RONALD LEHMAN, New Jersey State Police; ALBERT G. PALENTCHAR, New Jersey Division of Criminal Justice; DONALD A. PAN-FILE, New Jersey Department of Treasury; WALTER PRICE, New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundations & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investi-  
gators in the New Jersey Division of Criminal Justice,

*Petitioners,*

VS.

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES, FOUNDA-  
TIONS & STRUCTURES, INC., WILLIAM E. MONAGHAN ASSOCIATES,  
AND MJD CONSTRUCTION COMPANY, INC.,

*Respondents.*

## On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

### MEMORANDUM OF RESPONDENTS SUGGESTING THAT THE CAUSE IS MOOT

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*Of Counsel and  
on the Brief*

No. 86-890

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1986

---

DEAN DEAKINS, *et al.*,

*Petitioners,*

*vs.*

WILLIAM MONAGHAN, *et al.*,

*Respondents.*

---

**MEMORANDUM OF RESPONDENTS SUGGESTING  
THAT THE CAUSE IS MOOT**

On December 26, 1984, Respondents, three individuals and three business entities, filed suit under 42 U.S.C. § 1983 in United States District Court for the District of New Jersey against petitioners, nine law enforcement officials of the State of New Jersey. The complaint sought (1) injunctive relief primarily seeking the return of documents taken from respondents pursuant to a search warrant on October 5, 1984, and (2) damages and such other relief as the court might deem just, including costs of suit and attorneys fees.

On August 6, 1985, the district court dismissed the complaint in its entirety on the ground that the *Younger* doctrine of equitable abstention required that result.

Thereafter, on July 31, 1986, the Court of Appeals for the Third Circuit reversed. By a 2-1 vote (Adams, J. dissenting), the Third Circuit ruled that *Younger* did not mandate dismissal of respondents' claims for injunctive relief. The Court, however, was unanimous in its conclusion that the district court had erred in dismissing respondents' claims for money damages.

Petitioners then sought review of the Third Circuit's decision in this Court. On January 27, 1987, this Court granted a petition for a writ of certiorari to review the following questions:

#### Questions Presented

1. Must federal courts, by virtue of a 42 U.S.C. § 1983 action for the return of property seized pursuant to a warrant, filed by the targets of an ongoing state grand jury investigation, intrude into that investigation despite the *Younger* abstention doctrine where the federal complainants may seek redress from the state court which supervised the grand jury and issued the warrant?
2. Are federal courts absolutely barred from exercising their discretion to dismiss an ancillary claim for damages when they properly abstain from the equitable portion of a 42 U.S.C. § 1983 action?

## ARGUMENT

### A. Question No. 1 Has Been Mooted By Subsequent Events

On September 10, 1986, after the Third Circuit's ruling, an indictment was handed down against three of the six respondents by a state grand jury. Trial on this indictment will be scheduled before the Superior Court of New Jersey, Law Division, Cumberland County.

The issuance of this indictment, effectively resolved the issue presented by Question No. 1. The Court to which the indictment was assigned for trial took jurisdiction over the respondents' demands for return of the documents seized pursuant to the October 5, 1984 search warrant and on March 17, 1987 ordered the return of certain documents seized on the ground that their seizure violated the attorney-client privilege. Further proceedings and motions directed at the return of other documents seized will be heard by the same court in connection with the ongoing criminal proceedings. As a result of this order, entered after this Court's grant of certiorari, respondents have been granted a portion of the injunctive relief sought in their federal § 1983 suit and now have a forum in which all of respondents' claims respecting the documents will be litigated. Accordingly, respondents have no further interest in pursuing their claims for injunctive relief in the federal courts. If this case is remanded to the district court, respondents will amend their complaint to eliminate any claim for injunctive relief and will further move to stay the damages portion of their § 1983 action until completion of all state criminal proceedings.

In-sum, in view of the post-certiorari action of the state court, there is no longer a case or controversy concerning



return of the documents, the issue presented in Question No. 1. Because respondents' request for injunctive relief thus has been effectively removed from the case, respondents respectfully suggest that the first question presented for review by petitioners is now moot.

**B. In The Absence Of A Request For Injunctive Relief, There Is No Independent Basis For Review Of Petitioners' Question No. 2**

Petitioners' second question asks this Court to determine whether a federal court has discretion "to dismiss an ancillary claim for damages when they properly abstain from the equitable portion of a 42 U.S.C. § 1983 action." This Court, of course, would only reach this question if it first determined that the "equitable portion" of respondent's § 1983 action mandated *Younger* abstention. However, the "equitable portion" of respondents' action has been effectively removed from the case by subsequent events.

Since the first question presented for review is moot, the case in its present form is no longer worthy of this Court's attention. Since respondents intend to agree to a stay of the damages portion of their case pending the completion of all state criminal proceedings, petitioners' second question has been deprived of any real significance.\* The *Younger* doctrine is designed to prevent undue federal

---

\* At the present time, more than two years has elapsed since the execution of the warrant at issue in respondents' § 1983 action. Consequently, if the federal action were dismissed, rather than stayed, pending resolution of the state criminal proceedings, a question would arise as to whether respondents' action would be time-barred under relevant New Jersey limitations statutes.

court interference with pending state proceedings. Obviously, the mere pendency of a § 1983 damages action that is stayed until the conclusion of the related state court proceedings poses no such threat. *Younger* thus has no application in this context.

Furthermore, stripped of any request for injunctive relief, the case presents the sole issue of whether a § 1983 action which seeks only damages should be dismissed under an application of the *Younger* abstention doctrine. That issue, of course, was never presented to the courts below and thus is not appropriately before this Court.

This case thus presents a classic example of a cause that has been effectively mooted by subsequent developments which remove from consideration the principal issue on which certiorari was granted. As a result, "there is no need for an opinion of this Court on the questions presented by the petition." *Burrell v. McCray*, 426 U.S. 471 (1976) (Stevens, J. concurring).

**CONCLUSION**

**For the foregoing reasons, this case should be vacated and remanded to the district court with leave to amend the pleadings. *Bryan v. Austin*, 354 U.S. 933 (1957); *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972).**

Respectfully Submitted,

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# **SUPPLEMENTAL BRIEF**



No. 86-890

Supreme Court, U.S.  
FILED

MAY 22 1987

JOSE PR P. SPANOL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1986

DEAN DEAKINS, New Jersey Division of Criminal Justice; IRVING DUBOW, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; RONALD LEHMAN, New Jersey State Police; ALBERT G. PALENTCHAR, New Jersey Division of Criminal Justice; DONALD A. PAN-FILE, New Jersey Department of Treasury; WALTER PRICE, New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundation & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice

*Petitioners,*

vs.

WILLIAM MONAGHAN, THEODORE DESANTIS,  
JOHN JAMES, FOUNDATIONS & STRUCTURES, INC.,  
WILLIAM E. MONAGHAN ASSOCIATES, AND  
MJD CONSTRUCTION COMPANY, INC.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals  
For the Third Circuit**

**MEMORANDUM OF PETITIONERS IN OPPOSITION TO  
THE SUGGESTION THAT THE CASE IS MOOT**

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ATTORNEY OF RECORD

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RICHARD J. HUGHES  
JUSTICE COMPLEX  
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In The  
**Supreme Court of the United States**  
October Term, 1986  
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DEAN DEAKINS, New Jersey Division of Criminal Justice; IRVING DUBOW, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; RONALD LEHMAN, New Jersey State Police; ALBERT G. PALENTCHAR, New Jersey Division of Criminal Justice; DONALD A. PANFILE, New Jersey Department of Treasury; WALTER PRICE, New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundation & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice

*Petitioners,*

vs.

WILLIAM MONAGHAN, THEODORE DESANTIS,  
JOHN JAMES, FOUNDATIONS & STRUCTURES, INC.,  
WILLIAM E. MONAGHAN ASSOCIATES, AND  
MJD CONSTRUCTION COMPANY, INC.,

*Respondents.*

—o—  
**On Writ of Certiorari to the United States Court of Appeals  
For the Third Circuit**  
—o—

—o—  
**MEMORANDUM OF PETITIONERS IN OPPOSITION TO  
THE SUGGESTION THAT THE CASE IS MOOT**  
—o—

Respondents suggest that this case has become moot. They also admit that the case is not yet moot but promise that if this Court dismisses the case as moot they will amend their federal complaint to eliminate claims for injunctive relief. This, they claim, will make the case moot. Respondents' contentions are misleading and their promises are vague.



Succinctly stated, respondents filed a 42 U.S.C. sec. 1983 action requesting injunctive relief—the return of documents seized as a result of a search pursuant to a warrant—and for damages due to the allegedly illegal actions of state officers prior to and during the search. The district court granted petitioners' motion to deny the injunction and dismiss the complaint. The Third Circuit Court of Appeals reinstated the complaint and remanded for a hearing concerning injunctive relief. Petitioners raised the following questions in the petition for certiorari:

1. Must federal courts, by virtue of a 42 U.S.C. sec. 1983 action for the return of property seized pursuant to a warrant, filed by the targets of an ongoing state grand jury investigation, intrude into that investigation despite the *Younger* abstention doctrine where the federal complainants may seek redress from the state court which supervised the grand jury and issued the warrant?
2. Are federal courts absolutely barred from exercising their discretion to dismiss an ancillary claim for damages when they properly abstain from the equitable portion of a 42 U.S.C. sec. 1983 action?

Certiorari was granted on both questions.

Respondents contend that two subsequent events have changed the posture of this case. One of these "subsequent" events has not just occurred, the other occurred before the petition for certiorari was filed. We have continuously contended that respondents' motion for injunctive relief should be made in the state courts. Respondents have incorrectly asserted (and the Third Circuit has agreed) that no adequate state forum existed. In our petition for certiorari we noted that an indictment had been returned. Respondents have now realized that since

the indictment has been returned they do have an adequate state forum.

The indictment makes little difference. Prior to the indictment respondents could have moved before the state courts for the return of the documents which were seized pursuant to warrant by state officials. Following the indictment they can make precisely the same motion to precisely the same court. The only change is that they must now make their motions within the time limits set forth by the New Jersey court rules. For purposes of the present action this change is meaningless.

The other "subsequent event" is respondents' newfound willingness to amend their complaint to dismiss their claims for injunctive relief. This event has not yet occurred and amounts to nothing more than a tactical maneuver to induce this Court to dismiss the writ of certiorari. This maneuver does not definitively resolve the issues raised in the petition.

Petitioners have contended from the outset that respondents' request for injunctive relief could best be handled by the state courts. Respondents have vigorously disagreed. Now, since certiorari has been granted to review the circuit court reinstatement of the complaint, respondents have decided that, at least for the present, they would prefer to have the state courts resolve their claims for injunctive relief rather than risk an adverse ruling on all issues by this Court. This is not surprising. Obviously, respondents are concerned that not only will they lose their claims for injunctive relief but, also, that this Court will reinstate the district court order dismissing their claim for damages.

As noted above, now that an indictment has been returned, respondents must present their claims for the return of documents in the state forum in order to comply with New Jersey court rules. (See, *e.g.*, *N.J. Court R.* 3:5-7). Once these injunctive claims are presented to the state courts, respondents would normally be barred from relitigating the same claims in the federal forum. It is noted, however, that not all of the respondents in the present case are defendants in the state criminal case. Questions arise as to whether those persons who are not parties to the state action will be barred from relitigating these injunctive claims even after the state adjudication.

Moreover, there is no guarantee that respondents will raise in the state courts each and every contention presented in their federal court complaint for injunctive relief. If all of these claims are not raised and decided in the state proceedings, respondents will be at liberty to either re-amend their complaint to present these claims or to file a new complaint for injunctive relief even while state proceedings are in progress. Such a scenario is likely since, as noted in our petition, there is an ongoing grand jury investigation of respondents concerning charges related to those in the present indictment. It is possible that the grand jury investigation will continue even after the instant indictment is resolved. If this Court declines respondents' invitation to dismiss and decides that the Third Circuit erred in reinstating respondents' injunctive claims, however, it would not be possible for respondents to seek federal injunctive relief at least so long as a grand jury investigation is in progress. Thus, respondents' offer to make Point I moot is little more than a ploy to avoid the chance of an adverse decision by this Court

while retaining all of the advantages which they gained by virtue of the erroneous decision of the Court of Appeals.

It should be noted that respondents' promise to amend their complaint to withdraw their claims for injunctive relief amounts to nothing more than a settlement offer. This Court has previously ruled that tentative settlement offers do not render pending cases moot. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465 n.3 (1978).

Even viewed as a settlement offer, however, respondents' promises are inadequate. As previously noted, they merely offer to amend their complaint to withdraw their present requests for injunctive relief. They have not promised that they will not seek the same type of injunctive relief in the future even if state criminal investigations or proceedings are still in progress. The use of this tactic has been experienced by this Court in the past. *Kerr v. United States District Court for the Northern District of California, et al.*, 426 U.S. 394, 401 n.5 (1976).

Nor do the unindicted respondents, who are not technically parties to the state court proceedings, promise to be bound by the state court decision. Due to the non-binding, conditional nature of this stipulation, this issue is not moot. See *Furniture Moving Drivers v. Crowley*, 467 U.S. 526, 535 n.11 (1984).

Respondents have left themselves the option of raising their request for injunctive relief at a later date, even if a state criminal investigation is still in progress. If this Court dismisses the case as moot based upon respondents' tentative stipulation and they again move for injunctive relief, the district court will be bound by the very



circuit court opinion which is challenged in the present case. Petitioners' only recourse would be to again present the case to the circuit court which has already issued an unfavorable ruling and again petition for certiorari. This redundancy would be wasteful of the time and resources of the federal courts. Respondents, of course, could again stipulate to a dismissal of their claims for injunctive relief if this Court granted a second petition. In this manner respondents could continually seek relief from the lower courts while evading review by this Court. Thus, this issue falls squarely within the "capable of repetition yet evading review" exception to the mootness doctrine. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), *Vitek v. Jones*, 455 U.S. 480, 486-87 (1980).

Respondents contend that their present offer to dismiss the claims for injunctive relief somehow changes the case and forecloses the possibility that any action of this Court could cause dismissal of their complaint. In making this argument, respondents seek to mislead this Court as to the nature of the second question presented in the petition for certiorari. In the second question, which is quoted above verbatim, we asked whether a district court is absolutely barred from dismissing a section 1983 complaint in a case such as this. We thus focus on the propriety of the original order of the district court. The legality of this order cannot be gauged in light of subsequent events. The district court already dismissed the complaint. Our petition does not ask this Court to act as a court of first impression and to review the merits of our motion to dismiss the complaint. Rather, we ask that this Court act as an appellate court and restore the status quo which

existed prior to the erroneous Third Circuit decision by reinstating the order dismissing the complaint.\*

The time frame within which respondents' contentions are viewed is important. They did not seek to amend the complaint prior to the time that it was dismissed by the district court. If they had, the case would never have been presented to this Court in its present posture. Nor did they amend their complaint following its reinstatement by the Third Circuit. They waited to make their offer until after this Court had granted certiorari, petitioners had filed a merits brief and joint appendix, and their own brief was due on second extension. Nonetheless they devise to have this Court pretend that their complaint was never dismissed by the district court. The case was dismissed—and, we suggest, properly dismissed. We seek reinstatement of that dismissal. Respondents should not be permitted to avoid this Court's review of the propriety of that dismissal by proffering an amendment two years after the complaint was dismissed. Either the dismissal was proper under the facts as they stood at the time or it was not. It cannot be reviewed based on facts which developed two years after the order was entered. At this point the case can be made moot only by dismissal of respondents' complaint.

Respondents intimate at page one of their memorandum that they did not previously have a state forum in which to litigate their claims; therefore, they could not have made their present offer at an earlier stage of the

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\* Indeed, if this case is deemed moot we suggest that the opinion of the Third Circuit Court of Appeals be vacated and the district court order be reinstated.



proceedings. This is incorrect. Their contention in this regard is based on the supposition that no appropriate state forum existed until they were indicted. Since respondents were indicted before the petition for certiorari was filed, however, they obviously could have made their present offer before certiorari was granted. Moreover the question of whether they did have an adequate state forum prior to the return of the indictment is a major issue which is raised in Point I of the petition. If petitioners are correct in asserting that under state law such a forum not only existed but was actually being used by the parties, then respondents have absolutely no excuse for their failure to make their present offer earlier.

Respondents have argued in their responding brief that based on the opinion in *Pennzoil Co. v. Texaco, Inc.*, — U.S. —, 107 S.Ct. 1519, 1529 (1987), this Court must consider the case on the facts as they existed when their complaint was filed. We will address the impact of the *Pennzoil* opinion to the issues presented herein in our reply brief. It is clear, however, that *Pennzoil* demonstrates that this case is not moot. At the time the complaint was filed in this case and at the time the district court order was entered, respondents' claim for damages was coupled with a claim for injunctive relief. Based on these facts the dismissal was proper. The fact that respondents are willing at this late date to return to the district court to amend their complaint has absolutely no effect on the legality of the original order. As in *Pennzoil* we request that the validity of the district court order be determined based on the facts as they existed in the district court. *Id.*

Respondents, in their zeal to convince this Court that the case should be dismissed, interpret the second question

presented in the petition very narrowly. Petitioners contend that the case should have been dismissed due to the pendency of a state grand jury investigation, even if there were no claims for injunctive relief. We further contend that respondents' recourse would have been to file their claims for damages in the state courts. Respondents state that this question was not presented to the courts below and intimate that it is not encompassed within the issues presented to this Court. Both of the allegations are incorrect.

In response to the assertion that this question was not presented to the courts below it is sufficient to note that the Third Circuit addressed this argument. *Monaghan v. Deakins*, 789 F.2d 632, 635-36 (3d Cir. 1986). Indeed, the circuit court opinion specifically states that petitioners raised this alternative argument. *Id.*

Moreover, although petitioners phrased the question presented to comport with the precise status of the case prior to respondents' present stipulation, this question subsumes the issue of whether the case should have been dismissed due to the pendency of the state grand jury investigation. This question was addressed in the body of the petition for certiorari and was responded to in respondents' opposition to the petition. This question is addressed in detail in petitioners' merits brief and has been responded to in respondents' reply brief and in the proposed *amicus curiae* brief of the American Civil Liberties Union. It thus presents a continuing basis for this Court's jurisdiction even if the injunctive portions of this case are deemed to be moot due to respondents' offer of stipulation. *Supreme Court R.* 15.1(a); *Arkansas Elec. Co-op v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382

n.6 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982); *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980).

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**CONCLUSION**

Based on the foregoing arguments petitioners suggest that the case is not moot.

Respectfully submitted,

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Of Counsel and on the Memorandum

Dated: May 21, 1987

# REPLY BRIEF



In The  
**Supreme Court of the United States**  
October Term, 1986

SEP 3 1987

JOSEPH F. SPANIOLO, JR.  
-CLERK

DEAN DEAKINS, New Jersey Division of Criminal Justice; IRVING DUBOW, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; RONALD LEHMAN, New Jersey State Police; ALBERT G. PALENTCHAR, New Jersey Division of Criminal Justice; DONALD A. PANFILE, New Jersey Department of Treasury; WALTER PRICE, New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundations & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and JOHN DOE, an individual training investigators in the New Jersey Division of Criminal Justice,

*Petitioners,*

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MJD CONSTRUCTION COMPANY, INC.,

*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit

**REPLY BRIEF FOR PETITIONERS**

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— o —

**REPLY BRIEF FOR PETITIONERS**  
— o —

**STATEMENT OF THE CASE**

Petitioners rely on the statement of the case contained in their merits brief with the following additions. On May

12, 1987, respondents filed a suggestion that the case was moot. On May 31, 1987, petitioners responded that the case was not moot. On June 8, 1987, this Court rejected respondents' suggestion of mootness. — U.S. —, 107 S.Ct. 3181 (1987).

### LEGAL ARGUMENT

#### POINT I. THE CASE IS NOT MOOT.

In Point I of their merits brief, respondents repeat the arguments, contained in their previously submitted suggestion of mootness, that the return of a criminal indictment has rendered this case moot. Since this Court rejected this suggestion by order entered on June 8, 1987 (— U.S. —, 107 S.Ct. 3181 (1987)), we will not further brief this issue. Instead, we will rely on the arguments contained in our opposition to respondents' suggestion of mootness, which we filed on May 31, 1987.

We note, however, that at page 47 of their merits brief respondents agree with our previous argument that respondents John James, MJD Construction Company, Inc. and William E. Monaghan Associates may not litigate their claims within the present criminal investigation. Thus, if the case were dismissed as moot at least these three respondents would be free to continue or reinstate their actions for injunctive relief in the federal courts. Based on this fact and the arguments contained in our previous memorandum, petitioners argue that this case is not moot.

#### POINT II. THE THIRD CIRCUIT ERRED IN REVERSING THE DISTRICT COURT'S DECISION TO ABSTAIN.

##### A. Abstention is Proper.

In subpoint IIA, respondents attempt to convince by way of confusion. The primary question presented is whether the conditions precedent for invocation of *Younger*<sup>1</sup> abstention are present in this case. Sufficient conditions are: 1) that there are ongoing state judicial proceedings; 2) that these proceedings implicate an important state interest; and 3) that there is an adequate opportunity in the state proceedings to raise constitutional challenges. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

Respondents cite authorities such as *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) and *Steffel v. Thompson*, 415 U.S. 452 (1974). These cases stand for the proposition that where there has been absolutely no attempt to bring a criminal prosecution and, thus, no state court action, there are no pending state proceedings. The rationale behind these rulings is straightforward:

When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.

*Steffel v. Thompson*, *supra* at 462. This rationale has no impact on the present case, however. In this case the state

<sup>1</sup> *Younger v. Harris*, 401 U.S. 37 (1971).

courts are involved, and federal interference would reflect negatively upon the state court's ability to enforce constitutional principles.

Respondents' heavy reliance on this portion of *Steffel v. Thompson* misses the point for two reasons. First, in *Steffel* the plaintiff, although originally requesting both declaratory and injunctive relief, had abandoned his claims for injunctive relief by the time the case reached this Court. Therefore, this Court specifically declined to determine whether or not injunctive relief had properly been denied in that case. *Id.* at 463. This Court also declined to decide this issue in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179, 201 (1973). The *Steffel* Court emphatically refused to extend its restrictive language to the area of injunctive relief. Since injunctive, not declaratory, relief is the issue pending before this Court, respondents' reliance on *Steffel* is misplaced.

Second, in *Steffel* there were no proceedings of any kind pending which concerned that plaintiff. In contrast, in the present case not only were there pending grand jury proceedings at the time the federal complaint was filed, but the challenged actions of the state officers were performed pursuant to a court issued warrant.<sup>2</sup> Respondents' requests for injunctive relief relate to the return of property which was seized pursuant to the warrant. Although

2 Furthermore, the propriety of the challenged actions of the state officers in retaining the seized documents implicated the propriety of the subpoenas. Respondents went before Judge Lenox to challenge two of the subpoenas, but acquiesced by compliance with the remaining subpoenas. Thereafter, they filed their federal complaint seeking the return of documents covered by the unchallenged subpoenas.

respondents correctly characterize the issuance of the warrant as an *ex parte* procedure, they pay little heed to the fact that once the warrant is executed and the property is seized, the *ex parte* nature of the action ends. At that point, an aggrieved party has a full right to an adjudicatory hearing at which both the constitutionality of the issuance of the warrant and the manner of its execution may be contested. *New Jersey Court Rule 3:5-7(a)*.<sup>3</sup> The aggrieved party need not initiate an entirely new action but need only make a motion in the state initiated action.

This fact demonstrates the difference between applying the *Steffel* quote on which respondents mistakenly rely to the present case in which they seek injunctive relief for the return of property. In *Steffel*, the principles of equity, comity and federalism had little relevance, because that plaintiff sought declaratory relief barring a future prosecution, and there had been absolutely no judicial involvement at the time the complaint was filed. In the instant case, however, the state judiciary is deeply involved, and federal action would invariably intrude upon the interests of federalism and comity. Respondents seek to give an overly critical definition to the phrase "pending state proceedings" in an effort to camouflage the fact that the state judiciary was obviously involved in this case when it issued the warrant and, therefore, when respondents challenged

3 Respondents assert that petitioners' reference to *New Jersey Court Rule 3:5-7(a)*, which allows a party aggrieved by an allegedly unlawful search and seizure to seek, *inter alia*, the return of the seized property, is an effort to require exhaustion of state remedies in section 1983 cases. It is not. We merely assert that for *Younger* abstention purposes there exists a state judicial proceeding when an action has been initiated before a state court in which an aggrieved party may by motion raise his federal constitutional claims.



the issuance in the federal courts by filing the instant action.

It should also be remembered that the plaintiff in *Steffel* had not yet committed a crime for which he feared prosecution. There was no pending, ongoing investigation of Steffel. The present case involves plaintiffs who were under investigation for numerous crimes committed prior to filing their complaint.

In *Doran v. Salem Inn, Inc.*, also mistakenly relied upon by respondents, this Court resolved a portion of the question concerning the propriety of injunctive relief left open in *Steffel* and *Younger*. The *Doran* Court held that in certain circumstances a temporary injunction could be entered pending the outcome of a declaratory relief action. 422 U.S. at 930-31. In reaching this conclusion the Court set a high standard for the grant of a temporary injunction, noting that even a temporary injunction "seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns of federalism which lie at the heart of *Younger*." *Id.* at 931.

The *Doran* Court did not squarely address the issue of permanent injunctions. Recognizing that the granting of either declaratory or injunctive relief will have the same effect when a state statute or local ordinance is challenged, the Court required that at the successful conclusion of such a challenge a declaratory judgment should be entered rather than the "stronger injunctive medicine." *Id.*<sup>4</sup>

4 More important, however, the Court applied *Younger* abstention against M & L, one of the three federal plaintiffs. Unlike the other plaintiffs, M & L resumed its allegedly criminal activities and was served with criminal summonses on each of the three days after the federal complaint was filed.

The Court has thus recognized that any injunctive action which will interfere with the progress of even a possible criminal proceeding is a drastic remedy. Of course it has also been recognized that those aggrieved by the allegedly unconstitutional acts of the state must have a means to redress their grievances. Federal injunctive relief is, therefore, warranted only in those instances where the state judiciary is not already involved. In this case, the state judiciary is involved. A state judge issued the warrant which lies at the heart of respondents' request for injunctive relief. In a state grand jury proceeding, this injunctive relief is inappropriate.

Thus, the cases upon which respondents rely concerning "threatened criminal prosecutions" do not support their position. Moreover, the arguments concerning this issue are irrelevant. Petitioners do not seek abstention due to the mere possibility of a criminal prosecution. Rather, we seek abstention because the state courts are already involved in the same issues upon which respondents now base their claims for injunctive relief.<sup>5</sup> Finding that a criminal investigation had been initiated before any contested matter had been decided by the federal courts, the

5 In *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965), this Court held that "since the grand jury was not convened and indictments were not obtained until after the filing of the complaint, which sought injunctive as well as permanent relief, no state proceedings were pending within the intendment of section 2283." This Court noted that to hold otherwise would invoke the anti-injunction statute (28 U.S.C. sec. 2283) due to a mere threat of prosecution. *Id.* This suggests that if grand jury proceedings had commenced long before the complaint was filed (as in the present case) they would have been considered pending state proceedings.

*Doran* Court ruled that abstention was required due to the pendency of the state court proceedings.

In addition to the fact that the state judiciary was involved in this case, by virtue of the issuance of the search warrant, and the fact that the state grand jury proceedings were pending, it must be remembered that a state court hearing concerning a great number of the issues underlying respondents' requests for injunctive relief was contemplated by the judge and all parties prior to the filing of the federal complaint. That very hearing was formally instituted shortly after the complaint was filed. Respondents, however, mistakenly rely on *Pennzoil Co. v. Texaco, Inc.*, — U.S. —, 107 S.Ct. 1519, 1529 (1987), for the proposition that actions occurring after the filing of a section 1983 complaint may not be considered in an abstention analysis. In order to make this argument they must, of course, ignore the holding in *Doran* upon which they rely so heavily in other regards. In *Doran*, the summonses which instituted the state action and required abstention were filed after the federal complaint was filed and after the district court had denied a temporary restraining order. 422 U.S. at 925. Nevertheless, since the federal proceeding was at an early stage and no contested matter had been decided, abstention was required.

The *Pennzoil* case itself does not stand for the proposition argued by respondents. In *Pennzoil* this Court apparently did not consider the proceedings in the state courts which occurred after the filing of the federal complaint. This action was taken, however, in a fundamentally different factual situation. The subsequent proceedings which this Court declined to consider in *Pennzoil*

were the entry of a judgment by the state court, the denial of a motion for a new trial by operation of law, and a decision by the Texas Court of Appeals substantially affirming the trial court's decision. 107 S.Ct. at 1529, citing 107 S.Ct. at 1523 n.5. These subsequent proceedings may have been useful to show the harm which plaintiff, Texaco, Inc., would suffer. Thus, they may have been useful in gauging irreparable injury if abstention had not applied. They had no bearing, however, on any constitutional or abstention issue.

In the present case, on the contrary, the "subsequent proceedings" (which were actually precipitated by the parties' invocation of the auspices of the state courts prior to the filing of the federal complaint) bore directly on the constitutional issues raised in the federal complaint. As such, they demonstrate both that a state forum was available to litigate respondents' federal claims and that the forum had already been invoked by the parties.

The above argument demonstrates that this Court's decision not to consider subsequent tangential state court proceedings in *Pennzoil* does not foreclose the consideration of the subsequent proceedings in this case. We do not ask this Court to consider the outcome of the state proceedings in dealing with the abstention issue. We merely request that the availability and pendency of these proceedings be taken into consideration. Moreover, we suggest that the Court in *Pennzoil* did not intend to overrule the decisions in *Doran, supra*; *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, — U.S. —, —, 106 S.Ct. 2718, 2723 n.2 (1986); *Middlesex County, supra*, 457 U.S. at 436-37; and *Hicks v. Miranda*, 422 U.S. 332, 349 (1975), which allowed consideration of subsequent proceedings.



This suggestion is buttressed by the fact that *Pennzoil* does not even cite these cases and contains no discussion of the scope of this ruling or its applicability to other situations.

In *Pennzoil*, *supra*, this Court was also faced with a situation in which the federal plaintiffs had not availed themselves of their right to adjudicate federal constitutional questions within the framework of related state proceedings. As in *Pennzoil*, the present respondents seek to cast doubt on the state court's ability to fairly adjudicate their federal claims.<sup>6</sup> In *Pennzoil*, this Court stated that "denigration of the procedural protections offered by [state] law hardly came from [plaintiff] in good grace, as it apparently made no effort under [state] law to secure the relief sought in this case." *Id.* at 1528, citing *Middlesex County*, *supra*, 457 U.S. at 435. The Court continued, "[W]hen a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.* As in *Pennzoil*, related state court proceedings in this case may have provided respondents the relief they requested in the injunctive portion of their federal complaint. In fact, the state court has now provided a measure of that relief. (Rb21).

Respondents may attempt to distinguish *Pennzoil* on the ground that in that case a state trial had been held and a verdict had been returned prior to the institution

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<sup>6</sup> It is interesting to note that these doubts evaporated when the state court ruled in respondents' favor on certain issues. (Rb21).

of the federal suit. This provides no distinction whatsoever. In the present case the grand jury proceedings had been ongoing for some time before the federal complaint was filed. More important, as previously noted, the search had been executed prior to the time the federal complaint was filed, thus changing the *ex parte* proceeding involved in obtaining the warrant into an adversarial proceeding under state law. To obtain a state adjudication of their claims, respondents had only to file a motion within the context of the state initiated proceeding. Under state law, such a motion could have been filed at any time and did not have to await the return of an indictment. *New Jersey Court Rule 3:5-7(a)*.

Moreover, the parties herein invoked the auspices of the state court, to place under seal documents whose seizure was contested, during the execution of the search—long before the federal complaint was filed. If respondents did not intend to begin a state court proceeding at this point, they should not have invoked state judicial intervention at the time of the search. Having done so they can hardly claim that there was no pending state judicial proceeding. Indeed, the state judge used this rationale in rejecting respondents' request that he abstain in favor of the federal courts. By even making such an argument respondents have demonstrated their desire to turn the abstention doctrine on its head.

**B. State Proceedings Were Pending When Respondents Filed Their Federal Complaint, and Those Proceedings Afforded Respondents the Opportunity to Raise Their Injunctive Claims.**

In subpoints B and C of Point II of their merits brief, respondents contend that the state grand jury is not an



ongoing judicial proceeding and does not present an adequate forum in which to raise their constitutional claims. We disagree with these arguments. The majority of the contentions raised in these portions of respondents' brief have been addressed in petitioners' brief on the merits; we will therefore rely primarily on the arguments set forth in that brief.

Petitioners iterate at the outset, however, that as noted above in subpoint A, pending state proceedings existed and in some instances were invoked by respondents, on the basis of the issuance and manner of execution of the search warrant. Thus, assuming *arguendo* that this Court were to rule that ongoing grand jury proceedings are not pending proceedings for purposes of *Younger* abstention, respondents still would not prevail. The other state judicial proceedings to which we have previously referred provide an adequate ground for abstention.

We seek to clarify a point raised in respondents' brief. At page 39, respondents argue that the grand jury is an inadequate forum because it did not provide them with the opportunity to obtain damages or attorneys fees. This argument is meaningless and serves only to confuse the damages and equity issues. Petitioners have requested abstention from the injunctive portions of respondents' complaint and dismissal of the damages portion. We have not argued that there is any pending state action concerning damages and agree that there is no such action pending. Whether or not respondents have a means to obtain damages and attorneys fees is irrelevant to the question of whether the federal courts should abstain from considering injunctive relief for the return of property seized during a court ordered search.

Respondents also seek to cloud the issues and denigrate the role of the state courts by arguing that the grand jury acts as an arm of the prosecutor's office. By statute (N.J. Stat. Ann. sec. 2A:73A-6), court rule (*New Jersey Court Rule* 3:6-11) and judicial opinion (see *State v. Haines*, 18 N.J. 550, 557, 115 A.2d 24, 28 (1955)) the grand jury operates as an arm of the court. Respondents' derogatory aspersions to the contrary cannot change this fact. This is not altered by the prosecutor's authority to *request* the impaneling of a grand jury or by the prosecutor's authority to issue subpoenas in the name of the grand jury because, after all, the subpoenaed party can move before the assignment judge to quash the subpoena. *State v. Hilltop Private Nursing Home, Inc.*, 177 N.J. Super. 377, 392, 426 A.2d 1041, 1050 (App. Div. 1981). The New Jersey courts do much more than procedurally regulate grand juries (Rb36 to 37); they are available to decide substantive claims arising out of grand jury investigations and have done so in this case.

Respondents also claim to be harmed by the fact that grand jury proceedings have no fixed duration. Respondents argue that abstention, therefore, could be prolonged intentionally by state agents who are the subjects of a section 1983 action. First, it must be assumed that the state judiciary, which supervises the grand jury, will not sit idly by and allow such procrastination to occur. If an aggrieved party felt that procrastination of this type was occurring, however, his proper recourse would be to bring, by way of motion, the delay to the attention of the judge who supervises the grand jury. There is little doubt that the state judge would hear and act on such a motion. Thus, even in this situation, no theoretically aggrieved plaintiff

would long be harmed. Cf. *United States v. Furina*, 707 F.2d 82, 84 (3d Cir. 1983), citing *Di Bella v. United States*, 369 U.S. 121 (1962).<sup>7</sup>

**POINT III. THE DISTRICT COURT HAD DISCRETION TO DISMISS THE CLAIM FOR MONEY DAMAGES.**

Petitioners submit that the arguments regarding dismissal of the damages portion of the 42 U.S.C. section 1983 complaint contained in respondents' brief are adequately covered by our brief on the merits. In this brief, we merely seek briefly to clarify our position.

Both respondents and *amicus*, the American Civil Liberties Union, have argued this issue as if petitioners were attempting totally to eliminate the federal courts' role in section 1983 actions. They then argue against such a policy. This is a "straw-man" argument. We take no such position. Nor do we seek to impose an exhaustion requirement in actions of this type. Indeed, *amicus* has put forth its argument on terms that can best be described as permitting complainants to "forum shop" by choosing either

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<sup>7</sup> Respondents contend that their complaint alleged that at the time the complaint was filed there was no pending grand jury action focused on them. They further argue that for purposes of abstention this allegation must be accepted as true, citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974). (Rb29 and 29 n.7). This contention is preposterous. First, the complaint does not allege what respondents claim it alleges. Even if it did, that fact should certainly not stand as a bar to abstention. Otherwise, any federal plaintiff could avoid abstention by a mere statement in his complaint that no related state proceeding was pending. According to respondents' analysis such an allegation would be irrebuttable whether or not true and whether or not intended. The ruling in *Scheuer v. Rhodes*, *supra* at 233-36, did not involve abstention and is not even tangentially related to the point for which it is cited in respondents' brief.

the state or federal forum only after weighing the costs and benefits of proceeding in each system.

What we have argued is that dismissal is warranted when the federal action would unreasonably intrude upon pending state judicial proceedings or upon a grand jury investigation. The parties agree that *Younger* left open the question of whether abstention applies to a section 1983 suit seeking only damages. *Juidice v. Vail*, 430 U.S. 327, 339 n.16 (1977); see *Tower v. Glover*, 467 U.S. 914, 923 (1984). Preliminarily, we note that there is no need to decide this issue in this case, because respondents have requested equitable relief in addition to damages. Therefore, abstention, at least, is required. Still, abstention alone will not solve the problems of federalism which have become the bulwark of this Court's decisions in this area. See *Pennzoil, supra*, 107 S.Ct. at 1527. The pendency of the federal civil suit could have a chilling effect on the civil defendants and on the state's investigation. Moreover, respondents would be free to return to federal court in an attempt to redress any undue delay in the investigation. (See Rb38). In order to adjudicate such a complaint the federal judge would, of necessity, become involved in a review of the grand jury investigation. Such review is better left to the state judge who supervises the grand jury. Dismissal of the complaint will satisfy the concerns of equity without infringing upon plaintiffs' right to present their damages claim in state court. It is noted that these considerations apply even if the federal plaintiffs had not joined their requests for damages and attorneys fees with their request for equitable relief.

The briefs of respondents and particularly that of *amicus* rely heavily on belittling the impartiality and abili-

ties of the state courts to adjudicate federal constitutional issues. Attacks of this type have been repeatedly rejected by this Court and are of no merit. Indeed, the reasoning behind the entire *Younger*, *Pullman*<sup>8</sup> and *Pennzoil* line of cases requires this result. Indeed, respondents have quoted from *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509 (1972), in which this Court held abstention is proper where there exists a pending state prosecution wherein the federal plaintiff has an opportunity to raise the federal constitutional claims.

Interestingly, although arguing that they are entitled to an "immediate and certain forum to resolve their federal constitutional claims" (Rb20), respondents concede that the appropriate remedy is to stay their claim pending the outcome of the state criminal trial. (Rb20). Clearly, respondents' contradictory position demonstrates the propriety of dismissing, as opposed to staying, the instant federal complaint.

Finally, respondents argue at length that Third Circuit authority does not support petitioners' position concerning damages. Although we have not specifically referred to each of these cases we have addressed the reasoning underlying these opinions. Clearly our disagreement with the Third Circuit is the reason we requested a ruling from this Court on these important issues. We urge that the dismissal of the complaint by the district court was totally appropriate in this case and should be reinstated by this Court.

—o—

8 *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941).

## CONCLUSION

The district court properly exercised its discretion to abstain from the equitable portion and dismiss the damages and attorneys fees portions of respondents' complaint. This Court should reverse the order of the Third Circuit and reinstate the order of the district court.

Respectfully submitted, -

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**AMICUS CURIAE**

**BRIEF**

MOTION FILED  
MAY 15 1987

No. 86-890

8

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

DEAN DEAKINS, New Jersey Division of Criminal Justice; IRVING DUBOW, New Jersey Division of Criminal Justice; ROBERT GRAY, New Jersey Division of Criminal Justice; RONALD LEHMAN, New Jersey State Police; ALBERT G. PALENTCHAR, New Jersey Division of Criminal Justice; DONALD A. PANFILE, New Jersey Department of Treasury; WALTER PRICE; New Jersey Division of Criminal Justice; WILLIAM SOUTHWICK, New Jersey Division of Criminal Justice; RONALD SOST, New Jersey Division of Criminal Justice; JOHN DOE, an individual co-ordinating a search of the premises of Foundation & Structures, Inc.; JOHN DOE, an individual supervising investigators in the New Jersey Division of Criminal Justice; and John Doe, an individual training investigators in the New Jersey Division of Criminal Justice,  
*Petitioners,*

—vs.—

WILLIAM MONAGHAN, THEODORE DESANTIS, JOHN JAMES, FOUNDATIONS & STRUCTURES, INC., WILLIAM E. MONAGHAN ASSOCIATES, and MJD CONSTRUCTION COMPANY, INC.,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND  
BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION AND ACLU OF NEW JERSEY  
IN SUPPORT OF RESPONDENTS**

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**MOTION FOR LEAVE TO FILE  
BRIEF AMICUS CURIAE**

Come now the American Civil Liberties Union Foundation (ACLU) and the American Civil Liberties Union of New Jersey (ACLU-NJ) and move for leave to file the attached brief amicus curiae in support of Respondents. Pursuant to Supreme Court Rule 36, permission to file the brief was sought from both parties. Neither party has consented.

The ACLU is a nationwide, non-profit, non-partisan organization of more than 250,000 members dedicated to defending the principles embodied in the Bill of Rights. The ACLU-NJ, with more than 8,000 members, is one of its statewide affiliates. Both organizations have appeared frequently as amicus curiae before this Court.

This case presents important issues




related to the right of persons deprived of constitutional rights by state actors, to seek redress in a federal forum pursuant to 42 U.S.C. §1983. The ACLU opposes the use of doctrines such as exhaustion, comity, and abstention to deny litigants access to a federal forum for such claims.

Amici believe that the decision of the Third Circuit below should be affirmed for the policy reasons enumerated in the attached brief. Amici provide empirical data in support of the contention that federal courts are often more responsive, or thought to be more responsive, to claims that allege violations of constitutional rights than are State fora. Finally, amici urge that a significant quantum of federal supervision is necessary if the substantive rights which §1983 seeks to safeguard are to enjoy

widespread and meaningful protection.

The ACLU and ACLU-NJ therefore respectfully move for leave to file the attached brief amicus curiae in order to present this Court with their views on the need to preserve federal jurisdiction in cases alleging violations of constitutional rights under 42 U.S.C. §1983.

Respectfully submitted,

  
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### INTEREST OF AMICI

The interest of the Amici is fully set forth in the motion for leave to file Brief Amicus Curiae.

### STATEMENT OF THE CASE

Amici rely upon the Statement of the Case as set forth in the Respondents' brief, but wish to emphasize those facts which trigger their concern for the integrity and autonomy of the federal system should Petitioners' arguments be upheld.

According to the factual allegations of the federal complaint which must be accepted as true for purposes of this proceeding, Respondents were the victims of an unconstitutional search on October 5, 1984. They filed suit in federal court to vindicate their rights under the Fourth and Fourteenth Amendments to the United



States Constitution to be free from unreasonable searches and seizures and deprivation of property without due process of law, seeking both monetary damages and the return of their unlawfully seized property.

As a result of the District Court's action dismissing, in toto, their complaint, not only is Respondents' property still being withheld some 2 1/2 years later, but they also are without any prospect of financial vindication for the constitutional wrongs done to them. Indeed, one of the individual Respondents, John James, who has not been charged with any criminal wrongdoing by the State of New Jersey, even at this late date,<sup>1</sup> is

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<sup>1</sup> In its most recent decision dealing with abstention, this Court noted that on appeal it must address the issues as they existed at the time the district court was considering them. Pennzoil Co. v. Texaco, Inc., 55 U.S.L.W. 4457, 4461 (April 6, 1987) ("In this opinion, we have addressed the situation that existed on the

not a party to any proceeding to which he might present his federal constitutional grievances.

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morning of December 10, 1985, when this case was filed in the United States District Court for the Southern District of New York.") Although subsequent events might affect the district court's jurisdiction to adjudicate, see Hicks v. Miranda, 422 U.S. 332 (1975) (federal plaintiffs indicted prior to any proceedings of substance in the federal court), no such relevant events occurred in this case prior to the District Court's dismissal of plaintiffs' complaint.

### SUMMARY OF ARGUMENT

The individual's right of access to federal court for the purpose of seeking relief from unconstitutional state action must be reaffirmed. The 42nd Congress, in enacting what is today 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3), intended to provide a federal cause of action in federal court for state violations of individual rights irrespective of the availability of alternative state fora and state remedies, Monroe v. Pape, 365 U.S. 167 (1961), including actions for injunctive relief, Mitchum v. Foster, 407 U.S. 225 (1972).

The individual's right to choose a federal forum for redress of such grievances may be denied only under "exceptional circumstances" where an important countervailing interest would be served. Colorado River Water Conservation

Dist. v. United States, 424 U.S. 800, 813 (1976).

The District Court's approach to this case, which is now urged by Petitioners, ignores these celebrated and essential principles and threatens their vitality.

In Younger v. Harris, 401 U.S. 37 (1971), and its progeny, this Court has carved an exception to the basic principle of access to a federal forum for injunctive actions that would interfere with state judicial proceedings already pending at the time of initiation of the federal suit and in which the federal claims could be litigated. See Steffel v. Thompson, 415 U.S. 452 (1971). But barring such "exceptional circumstances," the individual's right of access to a federal forum must be preserved. Amici do not challenge here the Younger exception. But because determinations in state

proceedings may bar subsequent federal damage actions as well, Allen v. McCurry, 449 U.S. 90 (1980), it is vital that the Younger exception be confined to its federalist purpose -- of avoiding interference with on-going state judicial proceedings.

A grand jury is not a judicial proceeding; it is an ex parte investigating body of citizens guided by a prosecutor. There are no parties before a grand jury. It does not become a judicial proceeding because a judge signs a warrant or is assigned to supervise its selection or give it legal instructions. Moreover, the opportunity under state law for an aggrieved citizen to initiate a separate proceeding before a judge has no bearing on the Younger status of a grand jury.

Amici challenge Petitioners' attempt to paint this as a Younger v. Harris case.

This is in reality a Monroe v. Pape case. Should Petitioners prevail, it would be the case in which the Younger exception might swallow the Monroe rule.



ARGUMENT

I. IN THE ABSENCE OF NARROWLY PROSCRIBED  
"EXCEPTIONAL CIRCUMSTANCES,"  
LITIGANTS HAVE THE RIGHT TO CHOOSE  
FEDERAL COURT ADJUDICATION OF CLAIMS  
FOR VIOLATION OF FEDERAL  
CONSTITUTIONAL RIGHTS

Congress intended the Civil Rights Act of 1871, now 42 U.S.C. §1983, to provide a private federal judicial remedy to anyone whose constitutional rights were being violated by a person acting "under color of any statute, ordinance, regulation, custom or usage, of any State ...." 42 U.S.C. §1983; and assigned jurisdiction over such claims to the federal district courts. Zwickler v. Koota, 389 U.S. 241, 247 (1967). See Adams & Travis, The Supreme Court's Shell Game: The Confusion of Jurisdiction & Substantive Rights in 1983 Litigation, 24 B.C.L. Rev. 635, 639-41 (1983). The Federal courts were to be used as "the primary and powerful reliances for

vindicating every right given by the Constitution, the laws, and treaties of the United States." Zwickler v. Koota, supra, 389 U.S. at 247 (emphasis added) (quoting Frankfurter & Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 65 (1928)).

In Monroe v. Pape, supra, this Court recognized that in enacting the Civil Rights Act, Congress intended to provide citizens with the federal right to choose a federal forum irrespective of the availability of State remedies for the same wrong. The Court's opinion stated:

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and claims of citizens to the enjoyment of privileges, rights and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies.

365 U.S. at 180 (emphasis added). And

several pages later, the Court added: "The Federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id. at 183.

Justice Harlan, with whom Justice Stewart joined, concurring, said that the statute reflected the legislature's view that "... a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." Id. at 196.

The Court reiterated its support for this construction of §1983 in McNeese v. Board of Education, 373 U.S. 668 (1963), where §1983 was invoked to combat a discriminatory policy of segregating black

and white school children in Illinois. The Court held that the purpose of §1983 would be defeated if petitioners were forced to litigate in the state courts first before being permitted access to the federal system. Id. at 672. The Court held that federal courts were created to enforce federal rights, and unless an "underlying issue of state law control[s] th[e] litigation," the federal courts should always exercise their jurisdiction to decide federal questions. Id. at 673-74. Finally, the Court observed: "We like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." Id. at 674 n.6 (quoting Stapleton

v. Mitchell, 60 F. Supp. 51, 55 (D. Kan., 1945), appeal dismissed pursuant to stipulation, 326 U.S. 690).

In the instant case, the Court of Appeals acted properly to protect plaintiffs' Congressionally-conferred right to choose a federal forum. The District Court provided no explanation for its extraordinary action in not only abstaining from deciding plaintiffs' equitable claims (as to which, see Point III, infra), but also dismissing their claims for damages. Petitioners attempt to explain that action with the observation that "[t]he courts of New Jersey provide a forum for suits premised upon 42 U.S.C. §1983, and will award attorneys' fees to successful plaintiffs." (Brief of Petitioners, at 32.) Under Petitioners' view, plaintiffs not only had to forego their right to a federal forum

on their claims for return of property, but had to institute state court actions in order to pursue their claims for legal relief under §1983. Such a theory ignores the Congressional mandate contained in the Civil Rights Act<sup>2</sup> as well as the principles enunciated by this Court since Monroe v. Pape to implement that mandate.

**II. THE NEED FOR A FEDERAL FORUM REMAINS AS COMPELLING TODAY AS IT WAS IN 1871 AND IN 1961, WHEN MONROE v. PAPE WAS DECIDED**

Congress provided plaintiffs the option of an original federal forum for vindication of constitutional rights,

<sup>2</sup> As four members of this Court noted in Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100, 117 (1981): "Subject only to constitutional constraints, it is exclusively Congress' responsibility to determine the jurisdiction of the federal courts," while it is up to the federal courts to exercise that "assigned jurisdiction in accordance with established principles respecting the prudent exercise of equitable power." (Opinion of Justice Brennan, with whom Justices Marshall, Stevens and O'Connor joined, concurring in the judgment.)



partly out of concern for the adequacy of state courts as forums for such claims.<sup>3</sup>

That concern is still valid today.

Studies indicate that, to a meaningful degree, state trial judges are, or are perceived to be, less responsive to federal law claims than are federal judges and lack the expertise of federal judges in interpreting and applying federal law.

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<sup>3</sup> The legislative debates leading to the passage of §1983's predecessor are replete with references to the special role of federal courts to protect constitutional rights. See Steffel v. Thompson, 415 U.S. 452, 463-68 (1974).

Representative Coburn stated most eloquently: "The United States Courts are further above mere local influence than the county courts; their judges can act with more independence; cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage ... we believe we can trust our United States courts, and we propose to do so." Cong. Globe, 42nd Cong., 1st Sess., 460 (1871). See also Allen v. McCurry, 449 U.S. 90, 106-10 nn.3-9 (1980) (Blackmun, J., with whom Justice Brennan and Justice Marshall, joined, dissenting); Mitchum v. Foster, 407 U.S. 225, 238-42 nn.28-32 (1972).

The problem is not alleviated by state appellate review since state appellate judges may be subject to the same parochial pressures as trial judges and have only limited authority to review fact findings. Nor is the problem reduced by the possibility of review by this Court. Such review, based on a discretionary writ of certiorari, is seldom granted and, even when granted, is limited by the state trial judge's findings of fact.

Conversely, the right of access to a federal trial court provides an impartial forum for the construction of a factual record.<sup>4</sup> Further, it offers access to

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<sup>4</sup> It is, of course, true that, depending on the litigational circumstances, many factual decisions will be made by juries, be it in federal or state court. However, even jury decisions are highly controlled by judicial oversight of the discovery process and the presentation of evidence, jury comment and instruction, and the power to grant

greater expertise in questions of federal law, and greater opportunity for federal review of trial court determinations. While the exact contours of the perceived and actual distinctions between the federal and state courts with regard to constitutional adjudication may vary among jurisdictions, the constitutional claimant is entitled to choose the forum in which to litigate the claim absent exceptional circumstances.

**A. Reasons Why Litigants Might Choose Federal Over State Courts for Adjudication of Their Federal Claims**

1. State trial courts tend to be less responsive to, and have less expertise in, federal law claims

summary judgment and direct verdicts. Moreover, in constitutional litigation, outcomes are often determined by complex doctrines of liability and immunity, involving mixed questions of law and fact relatively unique to federal law. See, e.g., Monell v. Dept. of Social Services of New York City, 436 U.S. 658 (1978); and Harlow v. Fitzgerald, 457 U.S. 800 (1982).

In vesting inferior federal courts with general federal question jurisdiction, Congress attempted to enable federal law plaintiffs to avoid the perceived prejudices of state trial courts. See Fair Assessment in Real Estate Ass'n v. McNary, *supra*, 454 U.S. at 124 n.11 (Brennan, J., with whom Justice Marshall, Justice Stevens and Justice O'Connor joined, concurring in the judgment). Congress had expressed a similar concern in enacting Section 1983.

Congress ... was concerned that state instrumentalities could not protect ... [federally created] rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Mitchum v. Foster, 407 U.S. at 242.

According to a 1969 ALI study, the "lack of sympathy - or even hostility" among state courts to federal law remained a

serious concern in many jurisdictions.  
ALI, Study of the Division of Jurisdiction  
Between State and Federal Courts, 167-68  
(1969) (hereinafter cited as ALI Study).

The perception of state court bias  
against individual federal rights is  
grounded in part in the close relationship  
of state trial judges to countervailing  
state or local interests. State judges  
who must stand for re-election are subject  
to majoritarian pressure when deciding  
public issues.<sup>5</sup> Neuborne, The Myth of  
Parity, 90 Harv. L. Rev. 1105, 1127-28

<sup>5</sup> We refer here to general perceptions  
and common differences between federal and  
state courts. In New Jersey, e.g., where  
this case originated, state judges are  
appointed, subject to tenured  
reappointment after an initial 7-year  
term. The political pressures posed by  
the reappointment process are similar to  
those of electoral pressures in other  
states, as illustrated by the recent  
reappointment of Chief Justice Robert  
Wilentz by a vote of 21-19 in the New  
Jersey Senate. See "Wilentz Residency May  
Not End Debate," 119 N.J.L.J. 539 (April  
2, 1987).

(1977) (hereinafter cited as Neuborne).  
See also M. Redish, Federal Jurisdiction:  
Tensions In the Allocation of Judicial  
Power 2-3 (1980) (hereinafter cited as  
Redish). State judges confronted with  
federal law claims against other state  
officials are more likely to feel  
protective of such defendants. Whitman,  
Constitutional Torts, 79 Mich. L. Rev. 5,  
23-24 (1980).

While federal judges must also often  
balance the interests of the state against  
the rights of an individual when the two  
conflict, they can do so from a more  
impartial stance. "Without a direct,  
ongoing role in the state activities in  
question, the federal court can weigh the  
competing interests without having to  
leave one eye open to the potential  
effects of a decision on its role in the  
process." Chevigny, Section 1983



Jurisdiction: A Reply, 83 Harv. L. Rev. 1352, 1358-60 (1970) (hereinafter cited as Chevigny).

A second reason that constitutional claimants may prefer a federal forum is that "federal courts have acquired a considerable expertness in the interpretation and application of federal law ..." ALI Study at 164-65. State courts cannot match this expertise because

state trial judges try predominantly state cases and must concentrate on incorporating superior court rulings into their legal lexicon. Moreover, those federal questions that they do hear ascend through so many levels of state appellate review before reaching the United States Supreme Court as to insulate the trial court effectively from direct federal review. This combination of insulation and infrequency limits the state judge's incentive to familiarize himself with the intricacies of federal decisions.

Chevigny, supra at 1357.

These conclusions are supported by data from a recent study measuring

lawyers' attitudes in the choice of forum for constitutional litigation. See Marvell, The Rationales for Federal Question Jurisdiction: An Empirical Examination of Students' Rights Litigation, 1984 Wisc. L. Rev. 1315 (hereinafter cited as Marvell).

Marvell surveyed lawyers' attitudes toward the choice of forum for a single type of federal law, students' rights litigation. More than 1,300 interviews were conducted with lawyers involved in students' rights litigation during a four-year period, 1977-81. Marvell, supra at 1343-52.

Of the plaintiff lawyers who had filed in federal rather than state court, over half gave a reason related to their perceptions of the sympathies and philosophies of the judge, while more than a third cited reasons related to the

judges' abilities. Id. at 1354. The two major sympathy-related reasons were beliefs that (1) federal "[j]udges are more sympathetic to civil rights, individual rights, or constitutional claims," (2) federal "[j]udges are less inclined to protect the interests of local schools or governments." The single dominant ability-related reason was: federal "[j]udges are more familiar with the law in the case or with the type of case." Id.

When asked to comment generally on perceived differences between state and federal judges, both plaintiffs' and defendants' lawyers found that sympathy for individual rights was more common among federal judges than among state judges. Plaintiffs' lawyers agreed by a margin of nearly 9 to 1 (44% to 5%) while defendants' lawyers agreed by 42 to 1 (42%

to 1%). Id. at 1370.

Thus, it is not surprising that the overwhelming majority of Section 1983 plaintiffs sue in federal court. They are so motivated ... by factors such as a perceived sympathy for, and understanding of, Section 1983 claims by federal judges and a correspondingly perceived antipathy for, and lack of competence in connection with, such claims on the part of state judges. Reinforcing the view of Section 1983 plaintiffs that state courts are unfavorably disposed toward them is the fact that many Section 1983 cases are either brought by so-called unpopular plaintiffs or raise controversial and politically sensitive matters or both.

S. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of 1983, Section 1.13 at 26 (1986). This is, of course, not true in all jurisdictions. In some states, a majority of lawyers may prefer to litigate constitutional claims in state courts. The point is that Congress created a right of a federal forum because of an express belief in the bias or lack of independence or expertise

of state judges, as this Court expressly recognized in Monroe, Steffel v. Thompson, and Mitchum v. Foster, all supra.

**2. The problems associated with State trial court adjudication of federal claims are not mitigated by the Appellate Process**

Neither state appellate review nor the possibility of review by this Court can entirely eliminate the problems posed by less responsive or less experienced state trial courts. First, state appellate judges have limited authority to review the trial court's fact findings, and may be subject to the same majoritarian pressure as state trial judges. Second, the likelihood of review by this Court through writ of certiorari is remote. In any event, such review is restricted by the findings of fact in the state trial court.

(a) State Appellate Review

The effectiveness of state appellate courts in reviewing trial court determinations of federal constitutional matters is limited by two factors. First, state appellate review of credibility issues and fact findings is restricted. Neuborne, supra at 1116 n.45. This limitation is a critical drawback, especially in those areas in which the Court has emphasized the importance of intent and motive in constitutional adjudication. See, e.g., Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 284-87 (1977); Village of Arlington Heights v. Metropolitan Housing Div Corp., 429 U.S. 252, 264-66 (1977); Washington v. Davis, 426 U.S. 229, 247-48 (1976).

Second, the selection process for state appellate judges is generally the same as that for the state trial judges. See Escovitz, Judicial Selection and



Tenure 17-42 (1975). Thus, state appellate judges may be subject to the same majoritarian pressures as are state trial judges. Neuborne, supra at 1116 n.45.

Conversely, federal district judges, insulated from majoritarian pressure by the protections of Article III, are more likely to vigorously protect individual federal rights. See Redish, supra, at 2, 3. See also, Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 157-59 (1953).

The institutional limitations of state appellate courts translate into a lesser rate of success for claimants with federal constitutional claims. See Solimine and Walker, Constitutional Litigation in Federal and State Courts: an Empirical Analysis of Judicial Parity, 10 Hastings Const. L.Q. 213 (1983).

In 1983, Solimine and Walker published a survey of more than a thousand cases raising a federal constitutional claim, and covering a seven-year period from 1974 to 1980. The sample consisted of 438 federal district court cases and 608 cases from state intermediate appellate and supreme courts. Id. at 238, 250. Thus, the study compares a claimant's first opportunity to litigate a federal constitutional claim concerning the First, Fourth or Fourteenth Amendment in federal court to the second, or possibly third, opportunity to litigate a similar claim in a state court.

While the authors conclude that there is "no widespread disregard for the vindication of federal rights in state appellate courts," Id. at 252, their statistical results show a significant advantage to litigating federal claims in

a federal court.<sup>6</sup>

According to the results of the study, the federal constitutional claimant is more likely to prevail in federal district court than in a state appellate court by a 9-point margin, 41% to 32%. Id. at 240. Where the federal constitutional claim was raised in a civil action, the gap expanded to 12 points, 45% to 33%. In criminal cases, the gap reduced to 3 points, 34% to 31%.

Thus, when a federal constitutional claimant must forego a federal civil action in favor of a state criminal defense, the likelihood of success is reduced from 45% to 31%, a decline of more than 30%.

<sup>6</sup> Had the comparison been to state trial level courts, it is not unreasonable to assume that the disparity in results between state and federal fora would have been even greater than that reflected in the reported results.

Unlike other federal claims raised in State criminal proceedings, Fourth Amendment claims, such as those raised here, cannot be reviewed in federal court on habeas corpus. Stone v. Powell, 428 U.S. 465 (1976). In any event, no federal constitutional claims adjudicated in a State criminal proceeding may be the basis for a federal civil action. Allen v. McCurry, 449 U.S. 90 (1980). Thus, the application of Younger abstention here would deprive federal courts of concurrent jurisdiction and bestow exclusive State jurisdiction on this class of cases in contravention of Congress' Article III powers.

(b) Supreme Court Review

The possibility of review in this Court does not mitigate the problem. First, such review is unlikely. In the 1985 Term, this Court docketed over 4,200

cases, and review was granted in 6 per cent. This resulted in full opinions in 102 federal court cases, but only six state court civil cases. Note, The Supreme Court, 1985 Term: Part IV, The Statistics, 100 Harv. L. Rev. 304, 308-10 (1986). Second, even assuming review, the result would be conditioned by the findings of fact made in the state trial court. ALI Study at 167-68.

[S]uch review, even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination ... to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact.

England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964).<sup>7</sup>

<sup>7</sup> In order to protect the litigant's entitlement to a federal forum, England permitted him to preserve his federal claims for federal court adjudication following the disposition of state law issues by the state court under Pullman abstention. Younger abstention, on the

B. **Reasons for the Primary Jurisdiction of Federal Courts As Adjudicators of Federal Claims**

This Court has reaffirmed the right to and importance of a federal fact finder for constitutional claims. In England v. Louisiana State Board of Medical Examiners, supra, 375 U.S. at 416-17, this Court noted:

How the facts are found will often dictate the decision of federal claims. 'It is the typical, not the rare case, in which constitutional claims turn upon the resolution of contested factual issues.' Townsend v. Sain, 372 U.S. 293 ... Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been made by the district court, a litigant may not be unwillingly deprived of that determination.

In Colorado River Water Conservation Dist. v. United States, supra, Justice

other hand, together with the finality principles established by this Court in Allen v. McCurry, supra, and Migra v. Warren City Board of Education, 465 U.S. 75 (1984), creates an absolute bar to federal adjudication of original federal claims.



Stewart stressed the importance of original federal jurisdiction over questions of federal law because of the familiarity and experience of federal judges in interpreting and applying federal law and the greater likelihood of federal review of the trial court determination. 424 U.S. at 826-27 (Stewart, J., with whom Justice Blackmun and Justice Stevens joined, dissenting). Justice Stewart explained the greater likelihood of federal review as follows:

If tried in a federal court, these issues of federal law will be reviewable in a federal appellate court, whereas federal judicial review of the state courts' resolution of issues of federal law will be possible only on review by this court in the exercise of its certiorari jurisdiction.

**III. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE DISTRICT COURT MISAPPLIED ABSTENTION DOCTRINE NOT ONLY AS TO PLAINTIFFS' CLAIMS FOR DAMAGES BUT AS TO THEIR CLAIMS FOR INJUNCTIVE RELIEF AS WELL**

From the earliest application of abstention principles to prohibit federal court interference with state criminal prosecutions, it was held that the doctrine was inapplicable to damages actions. See Stefanelli v. Minard, 342 U.S. 117, 122 (1951): "[U]nder the very section now invoked [referring to the Federal Civil Rights Act], we have withheld relief in equity even when recognizing that comparable facts would create a cause of action for damages." Thus, irrespective of the applicability of Younger v. Harris abstention principles to plaintiffs' claims for injunctive relief, the District Court was unauthorized to decline to entertain the claims for

damages.

But amici further contend that abstention was also inappropriate in respect to plaintiffs' equitable claims -- that its application in the circumstances of this case would cut the Younger doctrine even further "adrift from its original doctrinal moorings." Pennzoil Co. v. Texaco, Inc., 55 U.S.L.W. 4457, 4465 n.2 (April 6, 1987) (Stevens, J., concurring).

The Younger doctrine was intended to reflect "a system in which there is a sensitivity to the legitimate interests of both State and National Governments ...." Younger v. Harris, 401 U.S. at 44 (emphasis added). As the Court's opinion emphasized, it does not contemplate "blind deference to 'States' Rights'," but rather a recognition that "the National Government will fare best if the States

and their institutions are left free to perform their separate functions in their separate ways." Id. (emphasis added.) Thus, Younger required that federal courts refrain from interceding on behalf of a federal claimant who is already involved in a pending state proceeding which provides an adequate forum for adjudication of those federal claims. See also Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

In every case in which this Court has required Younger abstention, the state proceeding in which the federal issues could be adjudicated was either already pending at the time of filing of the federal complaint, or, as in, Doran v. Salem Inn., Inc., 422 U.S. 922, 929 (1975), was initiated while "the federal

litigation was in an embryonic stage and no contested matter had been decided." To the same effect is Hicks v. Miranda, 422 U.S. 332 (1975), discussed in footnote 9, infra. In such situations, it would clearly intrude upon a state's ability "to perform [its] separate functions" for the federal court to attempt to interrupt those proceedings.

On the other hand, when a litigant invokes a federal court's protection from unconstitutional state action in the absence of a pending state proceeding, abstention "would turn federalism on its head", Steffel v. Thompson, supra, 415 U.S. at 472, and would ignore "the duty [Congress imposed] upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." Zwickler v.

Koota, supra, 389 U.S. at 248. As this Court emphasized in Zwickler, "abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim." Id. at 251.

Distinguishing deference to a "pending state proceeding," from a requirement that a federal litigant seek out and exhaust available state forums, is not mere semantics. It is the essence of the distinction between the Younger duty to abstain and the Monroe duty of the federal court to adjudicate. It is through the combination of these two interacting principles that federal courts attempt to counterbalance a "sensitivity to the legitimate interests of both State and National Governments ..." Pennzoil Co. v. Texaco, Inc., supra, 55 U.S.L.W. at 4460 (quoting from Younger v. Harris, supra). The reasons supporting abstention



"have little force in the absence of a pending state proceeding." Lake Carriers Assn. v. MacMullan, 406 U.S. 498, 509 (1972). Thus, just as pendency of an ongoing state proceeding requires federal deference, the absence thereof mandates that the federal court perform its function as the "primary guardian[ ] of constitutional rights." Steffel v. Thompson, supra, 415 U.S. at 463.

The instant facts illustrate the wisdom of this distinction. As the uncharged victims of an allegedly unconstitutional search, respondents had their federal rights violated but they were not parties to any ongoing state proceeding. It may have been true that a state grand jury was looking into their activities connected with that search, but respondents were strangers to that proceeding and might not receive word of

its investigations for months, or even years, to come.<sup>8</sup>

A grand jury is not a judicial proceeding for adjudication of constitutional challenges to searches. There are no parties before a grand jury, only possible targets. A New Jersey court has described the grand jury as an

inquisitorial, informing, and accusing body, but is generally not regarded as a judicial body or tribunal; it always proceeds ex parte and it is not a trial body or the ultimate fact-finder.

Rosetty v. Hamilton Township Committee, 82 N.J. Super. 340, 348, 197 A.2d 600, 605 (Super. Ct., Law Div., 1964), quoting In

<sup>8</sup> Respondent James, as far as the record shows, has heard nothing of the grand jury's determinations as to him for over 2 1/2 years. A similar dilemma would be faced by the victim of a warrantless search, who would have even less reason to know whether any official body was examining the seized materials and when or whether a state proceeding might eventuate at which federal claims regarding the search might be advanced.

Re Neff, 206 F.2d 149, 152 (3d Cir. 1953),

which further stated:

It is clear, therefore, that the investigation of a grand jury is a proceeding which is wholly separate and distinct from, and of a different nature than, the subsequent trial of the defendant  
...

206 F.2d at 152, citing Ex parte Bain, 121 U.S. 1, 11 (1887). A grand jury does not become a judicial proceeding because the prosecutor or law enforcement officers apply, in the course of the grand jury investigation, to a judge for a search warrant. Only the applying officials are part of the warrant-application process.

Likewise, a grand jury does not become a judicial proceeding for adjudication of constitutional challenges because a judge is assigned to "supervise" it. While a judge charges the grand jury on the general standards governing its work, no judge presides over the jury's

deliberations. N.J.R. 3:6.

As this Court emphasized in Trainor v. Hernandez, supra, Younger abstention "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." 431 U.S. at 441 (quoting Gibson v. Berryhill, 411 U.S. 564, 577 (1973) (emphasis added)). Pendency of an ex parte grand jury investigation at the time of filing of the federal law suit does not guarantee the convening of a timely state proceeding to which respondents can present their federal objections to the search -- as the experience of respondent James amply illustrates.<sup>9</sup>

<sup>9</sup> The requirement of a state proceeding that can provide "timely" relief also distinguishes Hicks v. Miranda, 422 U.S. 332 (1975). Although Hicks held that Younger abstention was appropriate even though the federal plaintiffs were not indicted until shortly after the filing of

Nor does New Jersey Rule 3:5-7 provide the kind of "pending state proceeding" required for Younger abstention.<sup>10</sup> The issuance of a search warrant itself is an ex parte proceeding. While Rule 3:5-7 provides a mechanism for applications for return of illegally seized property, it requires the aggrieved

the federal complaint, there was a related criminal proceeding already pending in the state court at the time of filing of the federal complaint and the federal plaintiffs were added as co-defendants prior to any proceedings of substance on the federal action. Id. at 349-50. In the instant case, it was nearly two years after institution of the federal action and after proceedings in both the District Court and Court of Appeals had been completed before two of the three individual federal plaintiffs were indicted -- while the third plaintiff remains unindicted to this day.

<sup>10</sup> In some respects, the judge supervising the grand jury procedures -- in this instance Judge Lenox -- resembles more an administrative officer than a judicial officer. "[A]bstention for ... administrative proceedings [is] not required." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 239 (1984).

party to initiate a proceeding, which is not necessarily heard by the supervisory judge who issued the warrant. (See Appendix D to Respondents' Brief in Opposition to Certiorari.) In any event, Judge Lenox recognized that such a proceeding would be different, and separate from, those before him as a supervising judge. Thus, this is not a case of which it can be said that the availability of "an adequate state forum for all relevant issues" had been demonstrated "prior to any proceedings on the merits in federal court." Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 433 (1982).

The fact that respondents could have applied to a State judge to protect their federal rights does not satisfy the Younger requirement of an ongoing state proceeding any more than the mere



existence of a state trial court in which respondents might have filed a complaint for damages for violation of their federal rights satisfies it.<sup>11</sup> To so hold would do great violence to the settled principle that federal claimants do not have to exhaust available state remedies before opting for a federal forum, if, indeed, one would still be available after application of collateral estoppel.

<sup>11</sup> Clearly, the State judge, even if favorably entertaining a motion to return Respondents' property under N.J.R. 3:5-7 for violation of the federal Constitution, would have no authority to award damages or attorney fees under §1988. If respondents' federal complaint remained pending after return of their property, they possibly could have applied to the federal judge for the award of fees for the time spent vindicating their federal rights in the state proceeding. See generally Webb v. Board of Education of Dyer County, 471 U.S. 234 (1985). If the federal complaint had been dismissed, it is not clear whether or where respondents might file a new action to claim attorney fees in connection with the state proceeding.

## CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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